118—506

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. 958.

THE CITY OF ST. LOUIS, PLAINTIFF IN ERROR,

vs.

JOHN Q. MYERS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

FILED SEPTEMBER 26, 1884

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the State of Missouri, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said supreme court of the State of Missouri before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between John Q. Myers, plaintiff, and The City of St. Louis, defendant, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States, and the decision was against their validity; and wherein was drawn in question the validity of a statute of, or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; and wherein was drawn in question the construction of a clause of the Constitution or of a treaty or statute of or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said defendant, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second of October next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and custom of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 17th day of June, in the year of our Lord one thousand eight hundred and eighty-four.

Issued at office, in the city of St. Louis, with the seal of the circuit court of the United States for the eastern district of Missouri, dated as aforesaid.

[SEAL.]

A. P. SELBY,
Clerk of said Court.

Allowed by—

WARWICK HOUGH,
Chief Justice of the Supreme Court of Missouri.

2 The United States of America to John Q. Myers, Greeting:

You are hereby cited and admonished to be and appear at a term of the Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of Missouri,

wherein The City of St. Louis is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Warwick Hough, chief justice of the supreme court of Missouri, this 20th day of June, in the year of our Lord one thousand eight hundred and eighty-four.

WARWICK HOUGH,
Chief Justice of the Supreme Court of Missouri.

Due service of above citation acknowledged this June 21, 1884, by—

MYERS & ARNSTEIN,
Att'ys for Defendant in Error.

3 STATE OF MISSOURI, *set:*

Be it remembered that heretofore, to wit, on the 5th day of April, 1880, there was filed in the office of the clerk of the supreme court of Missouri a transcript, which is in the words and figures as follows, to wit:

4 *Date of Filing Original Pet.*

STATE OF MISSOURI, } *ss:*
City of St. Louis, }

Be it remembered that heretofore, on the 19th day of September, A. D. eighteen hundred and seventy-four, a petition was filed in the office of the clerk of the circuit court of St. Louis county, wherein John Q. Meyers was plaintiff and The City of St. Louis defendant.

Summons Returned Duly Executed.

Summons issued on the same day, and was returned executed on the 24th day of September, 1874.

And thereafter, on the 6th day of February, 1876, by leave of court, an amended petition was filed in the said cause, which is in the words and figures following, to wit:

Amended Petition.

In the Circuit Court.

JOHN Q. MEYERS, Plaintiff, — CITY OF ST. LOUIS, Defendant.

For an amended petition herein the plaintiff states that at the times hereinafter mentioned the defendant was a municipal corporation duly created under the laws of the State of Missouri, and as such had charge of the work of improving the streets and wharf of said city. That the plaintiff for many years past has been engaged in the business of operating and running a steam saw-mill in said city. That for the purpose of carrying on his said business the plaintiff has acquired, and at the time of the grievance hereinafter

set out was, and is now, the owner of, a certain leasehold described as follows: A lot of ground in said city of St. Louis and State of Missouri, situate in St. Ange Addition to the said city of St. Louis, a plat of which addition is on file in the office of the recorder of said city of St. Louis, said lot having a front of one hundred and
5 sixty-two (162) feet on the Mississippi river, and extending west to Second street in said city, excepting a sixty-foot street, called First street, and an alley between said First and Second streets, said lot being bounded on the north by land of Harney, east by the Mississippi river, south by Bryan street, and west by Second street, as laid out on said plat. Plaintiff further states that said lease commenced on the first day of January, 1870, and continues during the term of ten (10) years from that time, with the right in said plaintiff to remove, at the expiration of said lease, all buildings, improvements, and machinery put upon said premises; that for the purpose of carrying on said business there has been erected on said premises, at great expense to the plaintiff, a large steam-saw-mill, with all the engines, boilers, saw shafts, pumps, pipes, and other machinery necessary to the successful operation of a steam saw-mill, and also a large supply-water cistern and a small frame building used in connection with the said mill; all of which the plaintiff owned at the time of the committing of the grievance hereinafter mentioned, and was entitled to remove from said premises at the expiration of said lease. Plaintiff further states that at the time of the committing of the grievance hereinafter referred to said leasehold term belonged to the plaintiff, and was of great value, to wit, of the value of over thirty thousand (30,000) dollars, not counting the value of any of the said improvements erected thereon; that said premises were leased by plaintiff and said saw-mill erected thereon because of the fact that the depth of water and the nature of the current of the Mississippi river at that point and in front of said lot enabled the plaintiff to land large rafts of timber
6 at said point at the bank of said river, immediately in front of and upon his said leased premises, thence to be conveyed at a slight cost to said steam saw-mill for manufacture into lumber, said saw-mill being situated about the centre of said lot. That at the time of the committing of the grievance hereinafter mentioned the natural channel of the Mississippi river lay alongside and in front of the plaintiff's said leased premises, and it was and is essential that such should be the fact in order to keep said sand-bars and large deposits of mud from forming alongside and in front of plaintiff's said leased lot, and in order to keep the channel of said river always of sufficient depth, and sufficiently near to the west bank of said river and to plaintiff's said leased lot to allow of rafts of timber being landed at plaintiff's said premises for manufacture in his said mill. Plaintiff further states that immediately adjoining his said premises on the south, and running westwardly from said river, is a street, called Bryan street; at the foot of said Bryan St., at the point where it strikes said river, is but a few hundred feet from said saw-mill. Plaintiff further states that heretofore, to wit, during the months of July and August, 1874, said defendant

unlawfully caused a certain dyke, composed of limestone and other material, to be built in said river, commencing at the foot of said Bryan street and extending thence eastwardly a distance of over seven hundred (700) feet into and across the said natural channel of the said river, said dyke being about twenty (20) feet broad, and extending from the bed to the surface of said river, which said dyke was an obstruction to the navigation of said river, and was built against the protest of the plaintiff, and without warrant of law.

7 Plaintiff further states that at the time of the construction of said dyke he had a number of rafts composed of heavy timber, of great value, to wit, of the value of over ten thousand (10,000) dollars, lying on the bank of said river, and immediately in front of and upon his said premises, which said rafts were the property of said plaintiff, and had been landed by him in front of and upon his said premises and on said river bank in order that the logs forming said rafts might be hauled from that point to the said saw-mill, there to be manufactured into lumber by him as aforesaid, the said plaintiff then and there having costly appliances and apparatus contrived for the purpose of so hauling the same; and said lumber would have been so hauled and manufactured by plaintiff as aforesaid, had it been possible so to do; but plaintiff says that by the wrongful and unlawful construction of said dyke the said channel of said river was diverted from its natural course as aforesaid, and was thrown many hundred yards east of its said natural location, and there was shortly formed alongside the river bank, and in front of and upon plaintiff's said premises, an immense deposit of soft mud, over six (6) feet in depth, and extending along the entire river front of plaintiff's said premises, a distance of over one hundred feet from the original shore line as aforesaid, out into the said river; and that the water, in consequence of the building of said dyke, has become so shallow in front of plaintiff's said premises, and there has thereby also been formed there such an extensive deposit of soft mud and sediment, that it at once became, and has ever since continued, and during the continuance of said lease will continue to be, impossible to land any timber in front of or upon said premises, or to get any logs from said river to said saw-mill; and plain-

8 tiff has no other means of getting timber to his said saw-mill than by the means first aforesaid; so that by the unlawful and wrongful obstruction and division of said river by defendant as aforesaid has entirely destroyed the value of plaintiff's said leasehold term for the purposes of his said business and for all or any purposes. Plaintiff also states that in consequence of the sudden division of the said channel and the sudden formation of said mud deposit and sediment the said timber composing said rafts in front of and upon his said premises became suddenly and unavoidably submerged in the said mud deposit, and it has ever since been and is now wholly impossible to remove said logs, or any of them, and the same have become wholly lost to plaintiff, it being impossible to employ any machinery or force of any kind to work in said mud deposit and sediment in which said timber has been submerged, or in any other way to extricate the same. Plaintiff therefore says

that by reason of the said misconduct and wrong of the said defendant in the construction of said dyke he has been damaged in the sum of forty thousand (40,000) dollars; for which sum he prays judgment against said defendant together with his costs.

NATH'L MEYERS,
With whom are Glover & Shepley, Att'ys for Plaintiff.

And thereafter, at the February term, 1879, of said court, the following proceedings were had in said cause, to wit:

Demurrer to Amended Petition Overruled.

MONDAY, *March 3rd*, 1879.

JOHN Q. MEYERS *vs.* CITY OF ST. LOUIS.

It is ordered by the court that the demurrer to the amended petition submitted hereinto be overruled, and ten days' time
9 granted defendant to plead.

And afterwards, on the 11th day of March, 1879, an answer to said amended petition was filed, and also a reply thereto, which said answer is in the words and figures following, to wit:

In the Circuit Court of the City of St. Louis.

JOHN Q. MEYERS, Plaintiff, *vs.* CITY OF ST. LOUIS, Defendant.

The defendant, for answer to the amended petition herein, states that it is a municipal corporation, and that it was incorporated as such as early as 1822; and that its eastern boundary is and always has been the middle of the main channel of the Mississippi river; and that Bryan street, mentioned in the petition, is a public street of the city; and that the dyke composed of limestone, etc., spoken of in the said petition, is a continuation of the said Bryan street, and an extension thereof towards the eastern boundary of the city, and is and was entirely within the limits of the city of St. Louis.

Defendant states that the State of Missouri, by an act entitled "An act about swamp lands in St. Louis county," approved March 3rd, 1851, granted to the defendant all lands owned by the State not reserved for public purposes within the limits of the city of St. Louis; and, furthermore, the United States, by an act of Congress approved June 12th, 1866, granted in fee-simple to the defendant all the right, title, and interest of the United States in and to all the wharves, streets, lanes, and avenues, alleys, and public thoroughfares within the city of St. Louis. And by an act of the General Assembly of the State of Missouri entitled "An act to revise the char-
10 ter of the city of St. Louis, and to extend the limits thereof," approved March 4th, 1870, the defendant was authorized to construct all needful improvements in the harbor, comprising the bed of the Mississippi river, its channels, bayous, bars, and islands, from the mouth of the Missouri river to the mouth of the Merrimac river, and to control, guide, and deflect the currents of the river, and to erect, repair, and regulate public wharves and docks, etc.

Defendant further states that the public wharf of the city of St. Louis was duly established and opened in front of the premises described in the amended petition at the time and long before the time when the alleged injuries are said to have occurred. That said wharf included the landing in front of said premises, and north and south therefrom, and extended eastwardly as far as said alleged dyke was extended and built. That said Bryan street, at and before the times mentioned in the amended petition, was a duly established pubic street of the city, eastwardly and westwardly along the premises described in the amended petition, and also extending into the Mississippi river a distance over 100 feet, and to the east line of the wharf aforesaid. That before the happening of the alleged grievances Bryan street was constructed and improved only to the water's edge, and not to the eastern termination thereof, as established by law, and that about the time mentioned in the amended petition, the defendant being duly empowered thereto, did, for the purposes of completing Bryan street and controlling and deflecting the rapids and dangerous current of the river, as said street had theretofore been lawfully established, and that said street so constructed
11 is the dyke spoken of in the amended petition, and the construction and improvement thereof are the acts and injuries complained of in the amended petition, and no other; and defendant denies each and every allegation in the petition not herein admitted, and prays to be dismissed, with costs, &c.

LEVERETT BELL,
For Defendant.

Replication.

And the replication of said answer is in the words and figures following, to wit:

In the Circuit Court, February Term, 1879.

JOHN Q. MYERS, Plaintiff,
vs.
THE CITY OF ST. LOUIS, Defendant. } No. 31220, Room 5.

And now comes said plaintiff and for replication to the answer to the amended petition herein denies each and every allegation by way of new matter in said answer contained. Wherefore plaintiff prays judgment as in his amended petition herein he has already prayed.

NATH'L MEYERS,
With Grover & Shepley, Att'ys for Plaintiff.

And afterwards, at the February term, 1879, of said court, the following further proceedings were had in cause, to wit:

THURSDAY, *March 20th*, 1879.

Trial begun.

JOHN Q. MYERS *vs.* THE CITY OF ST. LOUIS.

Now at this day come said parties by their respective attorneys,

and this cause coming on for hearing, also came a jury, to wit: L. Pezott, Jr., Joseph Stagg, William Usher, Stephen D. Gore,
12 George I. Plant, John H. Turner, J. Harlock, Patrick Lamb, Dennis Lane, B. Hund, William S. Hicks, and Joel Morris, twelve good and lawful men, who being duly elected, tried, and sworn the issues herein joined well and truly to try, and a time verdict to render according to the evidence, the trial progressed and not being fully terminated at the hour of adjournment, is continued until to-morrow morning.

Trial Progressed.

JOHN Q. MYERS *vs.* THE CITY OF ST. LOUIS.

FRIDAY, *March* 21, 1879.

Now at this day come again said parties by their respective attorneys, and also came the jury empanelled herein; thereupon the trial progressed, and not being fully terminated at the hour of adjournment, is continued until to-morrow morning.

Progressed, etc., and Judgment.

JOHN Q. MYERS *vs.* THE CITY OF ST. LOUIS.

SATURDAY, *March 22nd*, 1879.

Now at this day come again said parties by their respective attorneys, and also came the jury empanelled herein; thereupon the trial progressed, and being fully terminated, the jurors aforesaid, upon their oaths aforesaid, say that they find for plaintiff, and assess his damage at the sum of thirty-five thousand dollars. Therefore it is considered by the court that the plaintiff recover of said defendant the damage aforesaid, assessed as aforesaid, and also his costs and charges herein expended, and have execution therefor. Verdict and instructions filed. Motion for a new trial and motion in arrest of judgment filed.

13 And thereafter, at the April term, 1879, of said court, the following proceedings were had in said cause, to wit:

Motion for New Trial and in Arrest of Judgment.

JOHN Q. MYERS *vs.* THE CITY OF ST. LOUIS.

MONDAY, *April 7th*, 1879.

It is ordered by the court that the motion for a new trial and the motion in arrest of judgment submitted herein be overruled.

Bill of Exceptions.

JOHN Q. MYERS *vs.* THE CITY OF ST. LOUIS.

WEDNESDAY, *April 23rd*, 1879.

Bill of exceptions allowed, signed, sealed, and filed, which said bill of exceptions is in the words and figures following, to wit:

Bill of Exceptions.

In the St. Louis Circuit Court-room, No. 5.

JOHN Q. MYERS *vs.* THE CITY OF ST. LOUIS.

Be it remembered, that on this twentieth day of March, A. D. 1879, the above-entitled cause came on to be tried by a jury, and the following proceedings were had therein.

The defendant objected to any testimony being introduced under the amended petition, because it did not state facts sufficient to constitute a cause of action, which objection was overruled by the court, and defendant then and there duly excepted. The defendant then moved the court to require plaintiff to elect whether he would proceed upon his claim for damages for loss of saw-logs or for damages to the lease-
hold estate, which motion the court denied, and the defendant
14 then and there duly excepted. Plaintiff introduced testimony tending to prove title to the lot described in the amended petition, on which the mill is situated, in Octavia Boyce, on the first day of October, 1859.

Lease from Octavia Boyce to Myers and Vahlkamp.

Plaintiff next introduced in evidence lease of said lot, dated January 10th, 1870, from Octavia Boyce to Myers and Vahlkamp, from Jan'y 1st, 1870, to Jan'y 1st, 1880:

This indenture, made the first day of January, in the year of our Lord 1870, between Mrs. Octavia Boyce, of the city of St. Louis, Mo., of the one part, and Meyers & Vahlkamp, of the other part, witnesseth:

That the said Octavia Boyce, in consideration of the rents, covenants, and stipulation hereinafter mentioned, and hereby agree to be paid, kept, and performed by the said Myers & Vahlkamp, their executors, administrators, and assigns, hath leased, and by these presents doth lease, to the said Myers & Vahlkamp a lot of ground situate in the St. Ange Addition to the city of St. Louis (a plat whereof is on file in the recorder's office of St. Louis county), having a front of one hundred and sixty-two feet on Front street, as laid out on said plat, and extending west to Second street, excepting a sixty-foot street called First street, and an alley between said First and Second streets, which said street and alley are to be left open for public use. Bounded north by land of Harney, east by the Mississippi river, south by Bryan street, and west by Second street, as laid out on said plat in block No. —, in the city of St. Louis, to commence on the first day in January, 1870, for and during the term of ten years, at the annual rent of five hundred and seventy-five dollars, payable in quarterly instalments on the first day of April, July, October, and January of
each year. Any failure to pay each quarterly rent when due
15 to produce a forfeiture of this lease, if so determined by said lessor or her successors. The lease of said tenement or any part of it is not assignable, nor is said tenement or any part of it to be underlet without the written consent of said lessor, under penalty of

forfeiture. No gambling, drinking, bawdy, or disorderly establishment shall be kept or permitted on said premises. And it is hereby covenanted that at the expiration of this lease the said tenement and premises are to be surrendered to said lessor, her heirs and assigns, or successors in the condition received, only excepting its natural wear or decay or the effects of accidental fire. All repairs deemed necessary by said lessees to be made at their expense, with the consent of said lessor, and not otherwise. All fixtures and improvements shall be bound for the rent and fulfilment of all other covenants herein contained on the part of said lessee. Any forfeiture of non-fulfilment of conditions herein may be enforced at any day or time, however distant, after such default or failure shall happen. The said lessee and all holding under them hereby engaging to pay the rent above reserved, and double rent for every day they or any one else in their name shall hold on to the whole or any part of said tenement after the expiration of this lease of its forfeiture. This tenement and premises to be kept free from any nuisance in or adjacent thereto at the expense of said lessees. Said lessees bind themselves to pay all taxes and assessments whether general or special charged against such property during the term hereof. At the expiration of said term all the covenants and conditions on the part of the lessees being fully completed with, they may remove all buildings and machinery put upon said premises.

16 Witness our hands and seals.

O. BOYCE.

By JOHN O. F. DELANY, *Att'y.* [SEAL.]

MYERS & VAHLKAMP. [SEAL.]

Lease from Boyce to Ludlow and Co.

Also lease to said lot from Henry and Octavia Boyce to Messrs. Ludlow and Co., dated Oct. 1st, 1859:

This indenture, made and entered into on the first day of October, eighteen hundred and fifty-nine, by and between Henry and Octavia Boyce, of the State of Louisiana, parties of the first part, and Noah M. Ludlow and Frances M. Ludlow, composing the firm of Ludlow & Co., of the city and county of St. Louis, and State of Missouri, parties of the second part:

Witnesseth, that said parties of the first part, in consideration of the rents reserved and the covenants hereinafter contained, do hereby grant, demise, and to farm, let unto the said parties of the second part the following-described property, to wit: A lot of ground situated in the St. Ange Addition to the city of St. Louis (a plat whereof is on file in the recorder's office of St. Louis county), having a front of one hundred and sixty-two feet on Front street, as laid out on said plat, and extending west to Second street, excepting a sixty-foot street, called First street, and an alley between said First and Second streets, which said street and alley are to be kept open for public use, in accordance with said plat, and bounded on the north by land of W. S. Harney, east by the Mississippi river, south by Bryan street, and west by Second street, as laid out on said plat. To have and to

hold the same, with all the rights, immunities, privileges, and appurtenances thereto belonging to, unto the said parties of the second part, and the executors, administrators, and assigns, for
17 and during the full end and term of ten years from and after the first day of January, A. D. 1860, under and subject to the stipulations herein contained, the said parties of the second part yielding and paying to the said parties of the first part for the said premises the rent of three hundred dollars per annum for the first five years and six hundred dollars per annum for the last five years, yearly, in equal quarterly payments—that is to say, seventy-five dollars on the first day of April, July, October, and January; and for the last five years the sum of one hundred and fifty dollars on the first day of April, July, October, and January in each year during said term; which rent the said parties of the second part, for their self and their executors and administrators and assigns, covenant well and truly to pay at the time aforesaid. And the said parties of the second part agree that if the rent aforesaid should at any time remain due and unpaid, the same shall bear interest at the rate of ten per cent. per annum, from the time it so becomes due until paid. And the said parties of the second part further covenant and agree that it shall be lawful for the said parties of the first part, and those having legal estate in the premises, at reasonable times to enter into and upon the same, to examine the condition thereof; and also that the said parties of the second part and their legal representatives shall and will, at the expiration of the said term, whether by limitation or forfeiture, peaceably yield up to the said parties of the first part, or to their legal representatives, the said premises, and the said parties of the second part, for and during all the time that they shall hold over the premises after the expiration of
the said term in either of said ways, shall and will pay to
18 the said parties of the first part double the rent hereinafter before reserved. The said parties of the second part hereby agree and bind themselves and their legal representatives to pay all taxes and assessments of whatever kind, whether general or special, that may be taxed, assessed, or imposed upon the property during the term and continuance of this lease. It is expressly agreed that at the end of *of* said term of ten years this lease shall be renewed at the option of said lessees for one further term of ten years, viz., to commence on the first day of January, A. D. 1870, and to continue until the first day of January, A. D. 1880, at a yearly rental of six per cent. upon the value of said ground, upon the usual terms of sale, without the improvements thereon, together with all taxes herein stipulated, which value shall be ascertained by each of said parties hereto, appointing one disinterested freeholder of said city to appraise the same, and if they cannot agree the said referees shall call in a third like disinterested freeholder of said city, and their decision shall be final and valid, which said valuation shall be made within sixty days previous to the termination of said term of ten years hereby granted. It is further understood and agreed to by the parties of this lease that the said party of the second part, or their legal representatives, shall have the privilege (and the right is

hereby granted them to do so) to remove at the final termination of said lease all buildings, machinery, and other improvements by them or their legal representatives put upon said grounds embraced within the lease: Provided, always, and these presents are on express condition, that if the said parties of the second part, or
19 their legal representatives, shall fail to pay the rent hereinbefore reserved for the space of ten days after the same shall have become due, or shall fail to perform any of the covenants hereinbefore entered into on their part, then the said parties of the first part shall be at liberty to declare this lease forfeited by serving a written notice to that effect on the said parties of the second part, or their legal representatives, and to re-enter upon and take possession of the demised premises free from any claim of the lease or any claiming under them. And the said parties of the first part covenant and agree with the said parties of the second part and their legal representatives that the covenants herein contained, being performed by the *by the* said parties of the second part, they shall peaceably hold and enjoy the said demised premises during the term aforesaid without hindrance or interruption by the said lessor or any other person.

In witness whereof the said parties have executed their indenture in duplicate, signing their names and affixing their seals to both parts thereof, the day and year in this behalf above written.

H. BOYCE. [SEAL.]
O. BOYCE. [SEAL.]
N. M. LUDLOW. [SEAL.]
FRANCES M. LUDLOW. [SEAL.]

Note.—The words "at the option of said lessees" interlined between the 14th and 15th lines before the delivery hereof.

JAMES M. CARPENTER.

I hereby witness the signatures of N. M. and F. M. Ludlow.

T. T. LUDLOW.

STATE OF MISSOURI, *County of St. Louis:*

Be it remembered, that on this 25th day of October, 1859,
20 before the undersigned, a notary public in and for said State and county, came Henry Boyce and Octavia Boyce, his wife, who are both to me personally known to be the same persons whose names are subscribed to the foregoing instrument of writing as parties thereto, and severally acknowledged the same to be their act and deed for the purpose therein stated. And the said Octavia Boyce, having had the contents of the said instrument first by me made known to her, acknowledged on an examination apart from her husband that she executed the same, freely and without compulsion or undue influence of her said husband.

In testimony whereof, I hereunto set my hand and affix my notarial seal, at St. Louis, this day and year aforesaid.

[SEAL.] JOSIAH Q. McCLELLAN,
Notary Public, St. Louis County.

21 STATE OF MISSOURI, *City of St. Louis:*

I, the undersigned recorder of deeds, do hereby certify that the foregoing is a true and correct copy of an instrument of writing from Noah M. Ludlow and Francis M. Ludlow of the acknowledgment and date of filing and recording the same as fully as the same remains of record in my office in book 276, p. 507.

Witness my hand and official seal this eleventh day of April, 1873.

[SEAL.] D. H. McADAM, *Recorder.*

Also assignment of said lease from James V. Westlake to John Q. Myers and Henry Vahlkamp:

Lease from V. Westlake to Myers and Vahlkamp.

This deed made on the twenty-sixth day of December, 1863, by and between James V. Westlake, of the city of St. Louis, and State of Missouri, party of the first part, and John Q. Myers and Henry Vahlkamp, of the same city, county, and State, parties of the second part, witnesseth: That the said party of the first part in consideration of twelve thousand five hundred dollars to him paid by the said parties of the second part, the receipt of which is hereby acknowledged, does by these presents remise, release, and forever quit-claim unto the said parties of the second part the following-described property, to wit: A lot of ground situated in the St. Ange Addition to the city of St. Louis (a plat of which is on file in the recorder's office of St. Louis county), having a front of one hundred and sixty-two feet on Front street, as laid out on said plat, and extending west to Second street, with the exception of a sixty-foot street called First street, and an alley between said First street and Second street, which said street and alley are to be kept open
25 for public use, in accordance with said plat, and bound north by land of W. S. Harney, east by Mississippi river, south by Bryan street, and west by Second street, as laid out on said plat, and being the premises leased by Noah M. and Francis M. Ludlow, of Henry and Octavia Boyce, by lease dated October 1st, 1859, of record in the recorder's office of St. Louis county, in book 258, p. 137, and subject to all the stipulations in said lease, together with all the improvements upon said lot, consisting of a steam saw-mill, together with all the fixtures, machinery, and appertaining thereto; also all out-buildings and offices thereon, to have and to hold the same with all the rights, immunities, privileges, and appurtenances thereto belonging, unto the said parties of the second part, and their heirs and assigns, forever. In witness whereof, the said party of the first part has hereunto set his hand and seal, the day and year first above mentioned.

JAMES V. WESTLAKE. [SEAL.]

Signed, sealed, and acknowledged in presence of the undersigned.
HERMAN A. HAEUSLLER.

STATE OF MISSOURI, *County of St. Louis:*

Be it remembered, that on this twenty-third day of December, eighteen hundred and sixty-three, before me, the undersigned, a notary public, duly commissioned and qualified within and for the county and State aforesaid, came James V. Wòstlake, who is personally known to me to be the same person whose name is subscribed to the foregoing instrument of writing as party thereto, and he acknowledged the same to be his act and deed for the purpose therein mentioned.

In testimony whereof, I have hereunto set my hand and affixed my notarial seal, the day and year last above written.

[SEAL.] HERMAN A. HAEUSSLER,
Notary Public, St. Louis County, Mo.

[U. S. — $20.00.]

26 *James M. Carpenter's Testimony.*

Plaintiff then called JAMES M. CARPENTER, who being duly sworn, testified as follows:

Q. Did you know Octavia Boyce in her lifetime?

A. Yes, sir.

Q. Were you in any way connected with her property? If so, in what way.

A. Yes; I had charge of her property from 1856 to the time of her death.

Q. What time did she die?

A. Two years ago in December last, I believe—about two years or a little over.

Q. Did you know the premises there described in these leases I have read?

A. Yes; I made those leases.

Q. Who was in possession of that leased property at the time the original lease was made to Ludlow?

A. Octavia Boyce.

Q. How long had she been in possession of that property, can you tell?

A. Since 1851 to my knowledge; I don't know any further back than that.

Q. Who had charge of that property in the collection of rents realized upon it from 1856 down to the time of Mrs. Boyce's death?

A. Mrs. Boyce was in possession. I had charge of the collection of rents.

Q. After the premises were leased to N. M. Ludlow and Co. what was done, if anything?

A. They built a saw-mill and operated it.

Q. About what time was the building of that saw-mill commenced, do you know? If so, state.

A. Latter part of '59, I think. I think the lease was made in October. I gave them three months to get up their mill, or partially so.

Q. Did you know of the assignment of this lease at the time it was made by Ludlow & Co. to Westlake?

A. Yes, sir.

Q. Did you know of the assignment by Westlake to Myer and Valkamp at the time it was made?

A. Yes, sir.

Q. Who collected the rent from Myers and Vahlamp from that time on to the time when a new lease was made to them?

27 A. I did.

Q. Was any agreement made by you, as agent of Mrs. Boyce, when the term created by the lease of Octavia Boyce and her trustees to N. M. Ludlow and Co. expired?

A. Yes, sir; renewed the lease.

Q. Prior to the expiration of the lease, did you have any conversation with Myer & Vahlamp in reference to any renewal, or their desire for a renewal?

A. Yes, sir; I had.

Q. State about when, if you recollect, in relation to the termination of the term created by the first lease?

A. It was about the time, or perhaps a little before or a little after the expiration of the lease, but in connection with the old lease and the renewal term provided for in the old lease.

Q. What did they say; what is your best recollection in relation to that matter?

A. They wanted to know upon what terms.

Q. What is your best recollection as to when that conversation was; when they first came; what time was it in reference to the expiration of the term created by the first lease?

A. It was very near the termination of the first term.

Q. Haven't you any recollection whatever whether it was before or after?

(Objected as leading.)

A. I don't recollect, sir. I couldn't swear to it, whether it was prior or after.

Q. Did you at the time that they expressed their desire give them any writing as agent of Octavia Boyce in relation to that matter?

Mr. SHEPLEY: I am asking his best impressions as to whether it was before or after the expiration of the first term that Myers and V. came to him in relation to their desire for a renewal.

The COURT (to witness): What do you say, Mr. Carpenter; was it before or after?

A. My impression is that the first conversation occurred prior to the termination, but the agreement was not arrived at until after the expiration of the first term of the lease.

28 Mr. SHEPLEY: Now, what is your impression as to what they first said to you upon their first approach to you, in relation to this matter?

A. They wanted to know at what rate I would renew the lease for the next ten years.

The COURT: Mr. Carptener, did they [ask] you for a renewal of the lease?

A. Yes, sir.

Q. And this lease was given?

A. Yes, sir.

Mr. MYERS: Was that the lease that was given in renewal? (handing paper to witness).

A. Yes, sir. This lease was made in pursuance of the power of the old lease. Paper referred to is a lease from O. Boyce, by att'y, to Myers & V., dated Jan'y 1, 1870, heretofore in evidence.

Q. From the time of the expiration of the first term of the lease made by Octavia Boyce and her trustees to N. M. Ludlow, from whom did you collect rent for those premises?

A. Myers & Vahlkamp.

Q. To whom did you account for those rents?

A. ——

Q. You collected them for Octavia Boyce?

A. Yes, sir.

Q. You accounted for them to Octavia Boyce as your principal?

A. Yes, sir.

Cross-examination:

Q. When did you collect the last rent on that lease running from 1870 to 1880?

A. I think it was about a year and a half ago, sir.

Q. Who did you collect that from?

A. From the German Bank.

Q. Where is the German bank?

A. Gone into bankruptcy now; used to be on Fifth and Market streets.

Q. Were they the lessees of that term?

(Obj. to by plaintiff.)

The COURT: What is the competency of this?

Mr. BELL: I offer to show by this witness that the plaintiff here parted with all his interest in this property about a year and a half ago, and he has no interest in it now whatever. It is a matter that goes to the amount of damages he is entitled to recover, or otherwise he will appear before this jury as the owner of *of* the property to-day.

(Obj. sustained, and the def't excepts.

Mr. BELL: You state that you collected rent of Myers & Vahlkamp on the last of January, did you?

A. Yes, sir.

Q. Well, now, how long did you continue collecting rent from them, Mr. Carpenter, on that lease?

A. Up to about two or three years ago. Two years, perhaps; I can't tell exactly without looking at my books.

Q. Do you know when it was Mr. Vahlkamp died?

A. No, sir. It is about three or four years ago; perhaps, three years.

Q. Did you collect any rent after the death of Vahlkamp?

A. Yes.

Q. Who from?

A. Principally from the German Bank.

Q. Did you prepare the first lease to Ludlow from 1860 to 1870?

A. I did.

Q. Do you remember that that lease contained the provision with reference to the renewal, that the renewal should be upon a yearly rental of six per cent. upon the value?

A. Yes; I made it.

Q. You remember what the lease contained, that the renewal was to be at the rental of six per cent. on the value, and it goes on to provide how that value shall be arrived at. Now, as to the amount of rent specified in the lease from 1870 to 1880, tell me how that was arrived at?

A. By agreement between Mr. Myers and myself.

Q. Any arbitrators appointed?

A. No, sir.

Q. Then the provision contained in the lease from 1860 to 1870 with reference to the renewal was not observed in framing the lease from 1870 to 1880?

A. Not in fixing the rate, it was not.

Q. You and Mr. Myers agreed between yourselves on the rate?

A. Yes, sir.

Q. And you gave him a new lease from 1870 to 1880?

A. Yes, sir.

Q. Was Vahlkamp also a party to those negotiations?

A. I am not certain; I think he probably came to the office with Myers, perhaps once or twice, but Myers did the principal talking.

Q. You transacted the business mainly with Myers?

A. Yes, sir.

30 *F. M. Ludlow's Testimony.*

Plaintiff called F. M. LUDLOW, who, being duly sworn, testified as follows:

Q. Where do you reside now, and how long have you resided?

A. I live in the city of St. Louis, on Compton Hill; lived there about seventeen years.

Q. Do you know anything about that lease (handing lease from 1860 to 1870)?

A. Yes, sir; I know something about it.

Q. Are you one of the parties to that lease?

A. Yes, sir.

Q. What did you do on these premises after you had executed the lease, if anything?

A. Carried on the saw-mill business.

Q. Who erected the saw-mill?

A. I did.

Q. Had you any knowledge of the property after you, N. M. Ludlow & Co., had transferred the lease?

A. Yes, sir.

Q. What, if anything, was added to the improvements after you had parted with your interest?

A. There was a new engine put in there; some other machinery.

Q. State who by, if you know.

A. Myers & Vahlkamp.

Q. What is your degree of acquaintance with saw-mills, engines, and boilers?

A. Well, sir, I have been in the saw-mill business a good many years, and I am a machinist by trade.

Q. How long at the time?

A. I have been at the business ever since I was 21.

Q. You consider yourself competent to form a judgment as to the value of improvements on mills and mill machinery and engines and boilers?

A. I do, sir.

Q. Please state what, in your estimation, were the value of the improvements put on those premises by Myers & Vahlkamp after the term had been assigned—transferred by you?

A. Well, I suppose twelve or fifteen thousand dollars' worth; in that neighborhood.

Q. Among other matters, were there any improvements under ground, in relation to the supply of water? If so, please state what.

31 A. Yes, sir; I made a large cistern there; I put them up one winter myself; a steam pump and considerable amount of pipe to draw the water from the river, and they afterwards made an additional improvement; did away with that and put in a much larger steam pump; dug a larger cistern, and put down larger pipe, bigger pipe, so as to get a larger supply of water and keep it in the cistern constantly; in addition to that he put in a larger engine, twice as large as the one they formerly had in the mill; good deal of new work, casting, and so on.

Q. After they had made their improvements, what was the kind and character and extent of this saw-mill?

A. Well, it was an excellent saw-mill; well gotten up, and well appointed in all its parts; good, powerful machinery, capable of doing good business.

Q. Competent to do a large business?

A. Yes, sir.

Q. At the time that you assigned, and also at the time, if you know the time, that the dike was built, will you state the depth of water in the river in front of these mills?

A. Well, they varied with the stage of water in the river; different seasons of the year.

Q. State them.

A. In the spring of the year, when the water was high, there was probably 20 or 25 feet there near the bank, perhaps 30 feet; I have known when it came to the top of the Iron Mountain railroad, and

that is nearly 25 feet above low-water mark; at low-water mark generally it is six or eight feet there.

Q. In reference to the facility of getting rafts up to the bank, and getting saw-logs out, will you state at any season of the year how this was situated?

A. It was excellent, excellent; best mill site in the city by far; I selected the site myself; I built the mill there after a pretty thorough acquaintance with all the other mill sites along the bank; picked it out for that special purpose, and it got better after I built the mill improvement.

32 Q. It was after an examination of all the other mill sites in the city that you selected this site?

A. I did, sir.

Q. As being the best?

A. Yes, sir.

Q. Describe what sort of a bank there was there first.

A. Well, there was a bluff bank, rocky bottom, and a good strong current on that side sufficient to carry the sediment off.

Q. How high was the bank?

A. Well, as I stated before, it was probably in the neighborhood of 25 feet.

Q. Was it a bluff bank or no?

A. Yes; it was a bluff bank. The same bank used by the Iron Mountain railroad that forms the bank of the river, and that was raised sufficiently high to prevent the extreme high water from overflowing it.

Q. How near the edge of the water was that at a fair stage?

A. It varies different seasons of the year. In high water, the water was right up along the line of the road, right close to it. At low water it may be forty, fifty, or sixty feet from the foot of the embankment out to the edge of the water.

Q. Did the forty or fifty feet at low water interfere with the expeditious handling of the logs and placing them in the saw-mill?

A. Not at all; there was good water there for floating them all the time.

Q. What was the character of the rocky bottom there?

A. Well, it was a natural rock.

Q. Was it sloping?

A. Yes; gradually sloping.

Q. Did it come up to the bluff bank or not?

A. Well, it was covered with earth, more or less, on top, you know. When it would be up there in high water it would deposit more or less sand and sediment.

Q. In reference to the situation of this saw-mill at the time you transferred, and at the time of this lease, and also at the time this dyke was built, just before this dyke was built, where, in relation to this saw-mill, was the natural channel of the river?

A. Right along that shore steamboats could run where we used to land rafts. That was the principal channel at the time. Most of the boats passed along that shore.

Q. What is the character of the current in relation to the landing of rafts. Any difficulty?

33 WITNESS: I am going to tell you about that. The first year that I commenced there the current was pretty rapid, pretty hard to land a large raft—a ten string pine raft—but we could do it by using three or four lines, and it got better each year. I occupied the mill, I think, three years, or a little over—from three to three and one-half years—it getting better each season after that, and the current smaller, seemingly, without any apparent loss in depth there; did not deposit any.

Q. Was your attention directed there in 1874, just about the time or just before the dyke was built?

A. Yes, sir; I was down there several times in 1874.

Q. How was the current then?

A. The current was very good; that is, there was some current there, as there will be in the channel of the river all the time, of course; it was a firm, broad channel.

Q. Was there anything to interfere with the proper landing of logs?

A. Nothing at all; no, sir.

Q. Anything dangerous about that current?

A. Nothing at all; I have seen, I suppose, fifteen or twenty steamboats laid up there by the Arsenal wall in the winter time.

Q. Was there anything done to it in the winter in reference to a landing or winter harbor for the boats?

A. Oh, yes. I just stated I seen as many as fifteen or twenty steamboats tied up along the bank in winter time for harbor.

Q. How was the outline of the bank, straight or otherwise?

A. Well, it was very nearly straight; of course not exactly straight.

Q. Practically, straight?

A. Practically, straight.

Q. Will you state, now, to the jury, how and in what manner logs were taken from the raft in the river and transported into the mill?

A. Yes, sir. The logs were got out of the raft and brought up on a wooden slide—incline slide—by steam power from the mill, and a rope hauled them right on to the mill floor itself without

34 any extra handling. They were able to handle such logs as they didn't want sawed on that day and leave them out on one side and put them in the yard.

Q. How was the facility for handling logs and getting them into the mill in relation to other mills in this city?

A. Well, they were very much better; very much less expense, and I should judge less cost, there than any other mills, from the fact of their being near the water, so that the logs could be reached by power from the mill.

Q. What was the length of the inclined slide you have spoken of?

A. I think it was about three hundred feet, as near as I can remember.

Q. Did it run above or below the track of the Iron Mountain road?

A. It ran underneath the track, through a culvert.

Q. Was there any protection to prevent the slide from being carried away in the matter of fastening?

A. Yes, sir; the slide is bolted down to the natural rock bed of the river. I put that down myself.

Q. Of course it extends into the mill?

[A.] Oh, yes; it extends into the mill; one end is in the water and the other end is in the mill—right on the mill floor to the saws.

Q. At the time this dyke was being constructed, were you there that part of the season?

A. I don't know that I was while the dyke was being placed there; I know of its being put there shortly after it was finished, though.

Q. Will you state how it was done; what the extent of the dyke was from the shore out into the river?

A. Oh, seven or eight hundred feet long, I should think.

Q. How broad was it upon its top or bottom, as far as you could see?

A. I never went out on the dyke; I never went out on the dyke at all; just stood on the shore.

Q. Just state.

A. Oh, I suppose, probably 15 or 18 feet wide.

Q. At the top?

A. Something like that; yes, sir.

Q. How was its formation—did it slope on either side?

35 A. Yes, sir; they usually throw the rock on the top, and not at the bottom.

Q. From your seeing what the slope was, can you form a judgment how wide it must have been on the bottom of the river?

A. Well, it is pretty hard to tell.

Q. I mean at the bank.

A. Oh, at the bank? It might have been 30 or 40 feet wide at the bank.

Q. Well, then, what is the necessary result if it was 30 or 40 feet wide at the bank—what is the necessary result as it extended out into the river—was it widened, or not?

A. Well, it might not; might have been about the same width out there; I suppose it was made sufficiently strong to resist the current; it was placed right in the current.

Q. Where did it commence in reference to Bryan street?

A. Just about the foot of the street.

Q. Did it occupy that side of Bryan street on the south or north side of Bryan street?

A. I couldn't speak definitely on that point; I noticed it especially with reference to Bryan street.

Q. You don't know whether it went directly out?

A. I couldn't tell whether just in the centre, or just a little to the north, or just a little to the south.

Q. You don't know whether it followed the precise line of Bryan street or not?

A. No, sir; I do not.

Q. What result did the formation of that dyke produce on this

mill property, if you know and have any means of framing a judgment?

A. Well, it caused the destruction of the landing.

Q. How?

A. By forming a deposit of mud, sand, etc.; they couldn't have the requisite depth of water for handling their logs after that; by forming an eddy there it caused the water to deposit a sediment.

Q. How long after the dyke was constructed did you see this property?

A. Well, I have seen it probably two or three times a year.

36 Q. How soon after the dyke was formed? Do you know how soon you saw it the first time afterwards?

A. Oh, I don't know; it may have been a month to two months.

Q. When you did see it, what had the formation of the dyke produced?

A. Well, the first time I saw it I didn't notice any peculiarity, excepting its deflecting the current of the river.

Q. How soon was it that it had this effect that you have spoken of upon the site of the mill; upon the bank?

A. Well, I can't tell you that, any more than in general terms; I presume it commenced having that effect as soon as the dyke was built; I think it would be a natural consequence; I could see the result afterwards—low water.

Q. What are the results?

A. Well, the formation of a bar there, as you might call it, causing a different channel of the river.

Q. In front of the mill site?

A. In front of the mill site—just above; deposited mud and sand, and covered up these log-ways.

Q. To what extent right opposite the mill?

A. At what time?

Q. At any time soon after.

A. I saw this about eight or nine months ago. I suppose 25 or 30 feet of sand on the bank.

Q. How much water?

A. Where the sand was there was no water.

Q. Then, instead of water in front of this mill site eight or nine months ago, it was sand?

A. Yes, sir.

[Q.] Dry ground?

A. Yes, sir.

Q. Anything else but sand?

A. Quicksand and mud.

Q. What was the character of the deposit there—hard or soft?

A. Well, it was like most Mississippi river deposits. It was hard in some places and soft in others. In the quicksand, of course, it was very soft.

Q. Could you walk over it?

A. No, sir; Mr. Pitzman attempted that when he was down there, and went in up to his armpits—happened to step a little out of the track.

Q. Were you there when Mr. Pitzman was surveying?
A. Yes, sir.
Q. How did he survey it?
37 A. Well, he ran a line out into the river there—sounded the river at different points from the shore. I didn't pay a great deal of attention to the details. He was moving his points on the shore line—taking his line, and marching, I believe, from one instrument to the other—something of that kind. I didn't notice him until after he got in, when he went in there, and pulled him out.
Q. Where was he when you went and pulled him out?
A. He was just above this dike, right opposite the old log-way.
Q. Of this saw-mill?
A. Right in that neighborhood.
Q. How far was he at that time from the front of the bank?
A. Probably seventy-five or a hundred yards from the Iron Mountain road.
Q. Where were you at the time you went after his succor?
A. I was on the river bank, below the road.
Q. On land or in a boat?
A. On land, standing on the shore a little higher up.
Q. Have you been in a boat?
A. No, sir; haven't been in a boat, at all.
Q. How much of the deposit that you have just spoken of was in a condition to support walking over it?
A. Oh, there was very little of it. There was probably a space of 40 or 50 feet next to the river line that was of similar character to this where Mr. Pitzman got in quicksand. Further back, where it was higher, probably the water hadn't been over it for a year to wet it; up next to the bluff there was, perhaps, well, maybe 30 or 40 yards that was dry enough to drive a wagon over it.
Q. That was the condition of the place where during the whole year, at the time that you conveyed this property—transferred it—it was in a condition to have rafts land there, and to use it for the convenience of your saw-mill?
A. I don't understand your question.
Q. I say that was the condition of that piece of property—
38 that at the time you transferred it, it was in a condition to have rafts and saw-logs landed there?
A. Yes; I understand it so.
Q. How soon after you saw the dyke did you notice this filling up, or the commencement of it?
A. I think it was the fall following.
Q. Did it increase?
A. Yes, sir.
Q. Fill up?
A. Yes, sir.
Q. Until it reached the condition of things that you have just described?
A. Yes, sir.
Q. How far out from the bluff bank is the line that is covered by

water now? How far does this material of deposit cover from the bluff shore?

A. The last time I saw it I suppose it was about—well, the water would cover all but about one hundred yards—the whole length of the dyke; about a hundred yards, I guess, was left bare between the bluff bank and the edge of the water, which would be about three hundred feet—something like that.

Q. The water line was thrown east about three hundred feet?

A. Yes, sir.

Q. What, if you know, was the depth of the water at this extreme eastern edge that you have talked about as being then the water line?

A. Well, the extreme eastern edge was about on a line with the end of the dyke; of course there was good water out there; good channel, but at the shore line of course there would be but little water.

Q. What was the depth of the water to that then formed there as the shore line?

A. I didn't sound there, and therefore couldn't speak positively; it looked to me like shallow water; I couldn't tell whether 18 inches or 2 feet.

Q. Where was the current at that time?

A. The current was out at the end of the dyke run; out around the point of the dyke.

Q. Where was it deflected; if any, where?

A. Deflected at the point of the dyke.

Q. Where did it turn? Did you examine to see where the main current of the water ran in relation to the Illinois shore from the end of the dyke?

39 A. Well, it went over towards Arsenal Island; that is, went eastward from the point of the dyke, in a southeasterly direction.

Q. Did you notice what was the condition of the water between that and the head of Arsenal Island?

A. I don't know that I remember that particularly.

Q. With what facility could rafts be landed, at the time which you speak of, intended for this saw-mill?

A. You mean at the present time?

Q. Yes; at the time you speak of.

A. Oh, couldn't handle them at all.

Plat shown to witness.

Q. Will you look at that representation of the premises and say whether, in your opinion, that correctly represents the premises about which the controversy arises?

A. Yes; that is a correct representation; that I suppose is a correct representation of the premises.

Q. That is, since the dyke was built?

A. Yes, sir; at the time Mr. Pitzman surveyed it; there is the saw-mill and the log-way down to the river fastened to the rock

bottom, and that dark line would be the embankment of the Iron Mountain railroad.

Q. That is the top line of the ridge of the bluff bank?

A. Yes, sir.

Q. And this is the water's edge at the time the drawing was made?

A. Yes, sir.

Q. Extending out here near to this break in the dyke; this high place represented is a break?

A. Yes, sir.

Q. Some top rocks had washed away?

A. Yes, sir.

Q. This represented the eastern point of the dyke?

A. Yes, sir.

Q. And this represents the deposit?

A. Yes, sir; that faint blue line I understand to represent the original shore line—the old shore line; that was low-water mark.

Q. That represented the edge of the water at the time the map was made?

A. Yes, sir.

Q. Extending in towards the shore as it went north?

A. Yes, sir.

Q. That was made when you were there with Mr. Pitzman?

A. Yes, that was the time.

Q. You stated you were in the saw-mill business for some years?

A. Yes, sir.

Q. In this city?

A. Yes, sir.

Q. About how many years?

A. About eighteen years—16 or 18 years.

Q. Do you consider yourself qualified to form an opinion as to what the leasehold was worth just prior to the building of that dike?

A. Yes, sir.

Q. Located as that mill was with reference to the river bank in view of the natural channel of the river and the nature of the shore and the bed of the river?

A. Yes, sir.

Q. The lease, then, had about six years to run. What, in your opinion, Mr. Ludlow, was the then value of the leasehold term?

Objected to, as incompetent and irrelevant. Objection overruled and exception saved.

A. Well, I should say about forty or forty-five thousand dollars for the six years.

Q. How do you arrive at that, Mr. Ludlow?

A. Well, I think it was worth seven or eight thousand dollars a year for the advantages of milling there—local advantages.

Q. What gave it that value?

A. I think it was the riparian rights that Mr. Bell has been speaking of.

Q. What do you mean by riparian rights?

A. The privilege of the water way, good channel, landing the logs close to the mill, facilities for getting them out.

Q. As it stood before the dike was built?

A. Yes, sir. I would just remark in explanation of that. One of the heaviest—and I expect the heaviest—items of the saw-mill is getting the logs out of the water into the mill—handling them.

Q. The expense?

A. Yes; one of the heaviest items of expense. It is almost entirely saved with a site such as that was formerly. Saves a very heavy item of expense.

Q. Now, what, in your judgment, was its value just after the building of that dike?

41 A. I think it was without value for that purpose, for that business.

Q. What was the effect, then, of the building of that dike?

A. It destroyed the advantages of doing a saw-mill business there; did away with it entirely; or, in other words, rendered the expense so great that nobody could carry it on at all.

Q. Couldn't make anything at it?

A. No, sir.

Cross-examination:

Q. Do you know how far Schulenburg & Boeckler's mill is from the water's edge?

A. I do not exactly, Mr. Bell; I know it is a long way off. I should say about twelve hundred feet, probably.

Q. Well, it is considerably further from the water's edge, Mr. Ludlow, than this mill is, assuming that the water's edge is now at the dike seven hundred feet out?

A. Somewheres in about that neighborhood; yes, sir.

Q. Do you know how far Knapp & Stout & Co.'s mill is from the water's edge?

A. Oh, quarter of a mile, I guess.

Q. Then why is it you say that the mill is absolutely destroyed for milling purposes?

A. Because I don't think either one of those parties could make a cent at saw-milling.

Q. Is anybody making a cent at saw-milling?

A. There are only those two mills running now in the city.

Q. Did you make any money at saw-milling?

A. Yes, sir.

Q. When?

A. When I was in the mill down here.

Q. What did you sell out for?

A. Because I had met with misfortunes before I got hold of that.

Q. It was your old debts?

A. Yes, sir.

Q. You made money while in the mill?

A. Yes, sir.

Q. How long did you run it?

A. About three years or three and one-half.
Q. You gave it up when?
A. I sold out in 1863; I believe it was in the fall of 1863. I think I commenced there in the spring of 1860, as near as I can remember now.

Q. And you haven't been engaged in the business since?
42 A. Yes; I was engaged in the business out on [the] Rocky Mountains two or three years after that.
Q. Not in the city of St. Louis though?
A. No, sir.
Q. Since 1863?
A. No, sir.
Q. How much a year did you make in the years when you run it?
A. Well, I made the first year I started—I made about $1,500 only; it wasn't a full year, only about six or seven months.
Q. What did you make the second year?
A. The next year after that I don't know; probably seven or eight thousand dollars; only small business capital.
Q. What did you make the third year?
A. The third year I made $15,000.
Q. Then you gave up?
A. Then I gave up.
Q. You sold out to who?
A. I sold out to—well, the property was sold under deed of trust to Westlake.
Q. Who held the deed of trust?
A. Mr. Myers.
Q. The plaintiff here?
A. No, sir; Nat. Myers was the owner; John Q. Myers was the trustee.
Q. Nat. Myers, his counsel?
A. No, sir; brother—his uncle.
Q. Another brother?
A. Yes, sir.
Q. And your interest was sold under the deed of trust?
A. Yes, sir.
Q. Purchased by Westlake?
A. Yes, sir.
Q. And sold by Westlake to Myers?
A. Yes, sir.
Q. Was John Q. Myers a clerk for you at the time?
A. Yes, sir; he was.
Q. How long had he been a clerk for you?
A. About a year.
Q. And he carried on the business afterwards, did he?
A. Yes, sir.
Q. Who was this man who was his partner?
A. Vahlkamp.
Q. Was he also a clerk for you?
A. No; he was foreman.
Q. He was your foreman?

A. Yes, sir.

Q. How long had he been with you?

A. Well, about two years, I think; a year and a half or two years.

Q. Then, after 1863 up to the time this dike was built in 1874, Myers & Vahlkamp continued the business?

A. Yes, sir.

Q. Do you know how much they made?

A. I do not of my own knowledge.

Q. Did they ever tell you?

A. Myers told me they averaged about twenty thousand a year.

Q. When did Vahlkamp die?

A. Let me see—I think it was in 1874.

Q. Just before the dike was built, didn't he?

43 A. Yes; or about that time.

Q. Then he left a large estate, did he?

A. I don't what the condition of his property was, sir; I have no means of knowing.

Q. Isn't it a fact, Mr. Ludlow, that so far from the mill business prospering in the hands of Myers & Vahlkamp, that when Vahlkamp died in 1873 his entire interest was swamped by the debts of the concern?

A. I don't know that for a fact.

Q. Is not that a fact?

A. I don't know that for a fact; I don't know much about Vahlkamp's affairs, or his estate after his death.

Q. You know Myers succeeded Vahlkamp's interest, don't you?

A. Yes, sir.

Q. Don't you know he got it without paying anything for it?

A. No, sir; I do not.

Q. That he got it by a settlement in the probate court?

A. I don't know how he got it.

Q. And that it was entirely extinguished by the debts of the firm of Myers & Vahlkamp?

A. I can't tell you anything about that.

Q. What was the ground worth—how much ground was there there?

A. At what time?

Q. When you sold it to Myers?

A. I suppose it was worth from 20 to 25 dollars a foot, Mr. Bell; I never had occasion to know.

Q. How much was there—how many feet?

A. Six hundred feet, I think, I had originally in the lease.

Q. Did you ever know of any sales down there?

A. No; might have been sales, but I was not interested in those matters and didn't look them up.

Q. Why do you fix twenty-five to thirty dollars a foot?

A. Well, I think property could have been sold for that there, and, perhaps, was sold; it is a mere matter of opinion you ask me what it was worth.

Q. That is, in 1863?

A. Yes, sir.

Q. How high was this property above low-water mark?

A. This mill site?

Q. Yes.

A. About twenty-five or thirty feet, I guess; I was going on to explain that the grade of the Iron Mountain road was raised about four feet above the level of the lot.

44 Q. When?

A. At that time.

Q. Before you built?

A. Yes; well, it never changed from that materially. About the same from the time I commenced building to the time I left the mill. I always understood the survey of that road placed it above the high-water mark of 1844. That would bring the grade of this lot about the same as high-water mark of 1844.

Q. Then when you went down there to build on this lot the Iron Mountain road ran between you and the river?

A. Yes, sir.

Q. And it was four or five feet above your ground?

A. Yes, about that.

Q. In building this slide by which the logs were drawn up, how did you do? Tunnel under the railroad track?

A. Well, I made the culvert there myself.

Q. And built the slide down?

A. Yes, built the slide down.

Q. In very low water were you at all inconvenienced in getting the logs up?

A. No, sir.

Q. Which was the most convenient stage for you, high or low?

A. High water, because we had that much less distance to pull them on the slide, but we could get them on the slide in high or low water without trouble.

Q. How was the Iron Mountain road built along there? Banked with earth or trestle work?

A. Oh, banked with earth—earth and rocks, the usual ballast on a railroad.

Q. Through there you made your tunnel?

A. Yes, sir.

Q. This whole question with reference to the damage inflicted by the city upon this mill property is confined to the question of procuring the logs, hauling the logs from the water to be manufactured?

WITNESS: You mean the statement I made as regards the statement I made as to the damage suffered by those parties?

COUNSEL: No; mean as to the damage suffered by these parties.

WITNESS: I don't know what these gentlemen have got into their heads to make up the bill of damages.

45 COUNSEL: We are talking about facts; isn't it a fact that the entire damage inflicted upon this property by the construction of the Bryan-street dike was that the logs in the Mississippi river were rendered more or less accessible?

A. Yes, I understand that is correct.

Q. The effect of building the dike was not to throw any water or mud on these premises at all, was it?

A. Yes, sir.

Q. Oh, no, you don't understand me. I mean within the limits of this lot of ground which you leased from Mrs. Boyce? Within these limits as described in the lease there was no water or mud there?

A. Yes, because this ground extended east of the Iron Mountain road.

Q. You don't catch my idea. That lease describes the land as bounded by the Mississippi river on the east?

A. Yes, sir.

Q. You went beyond the Iron Mountain road?

A. Yes, sir.

Q. Now the effect of building the dike was to create new ground east of the line of the Mississippi, where it existed when you took the lease?

A. Yes, sir.

Q. But the effect of this dike being built was not to throw any mud and water on these premises from the line of the Mississippi river when you took the lease?

A. Oh, no; I understand you; no.

Q. And the saw-mill as a building, and the machinery contained in it were not physically injured at all by the building of the dike?

A. No, sir.

Q. Look at this plat (handing same to witness), and stand down here so the jury can see. Now this is supposed to represent the line of the Mississippi river as it was when you leased the property. There is the lot in question right there, and here is the Bryan-street dike. That is south and this is north. Now I understand your testimony to be that originally when you got the property the water flowed right along the edge represented there, and you hauled your logs up, and the current flowed along there with considerable rapidity, and boats went there?

A. Yes, sir.

46 Q. The Bryan-street dyke was built out here, then seven hundred feet; the effect of that was to stop the current that flowed along here, and the sand settled and made ground right in front of these premises?

A. Yes, sir.

Q. And this mud where Mr. Pitzman was stalled that afternoon was out along in here?

A. Yes, sir.

Q. The effect of that dyke was to build new ground along there in front of the lot?

A. Yes.

Q. Now you know, do you not, that the building of this dyke was in pursuance of a plan adopted by the city under which the line of the wharf was established out in the Mississippi river, here indicated by the red line, and the very purpose of the dyke was to

make new ground in the old line of the river extending out to the new wharf?

Objected to by plaintiff, and objection sustained, and exception saved by defendant.

Q. These saw-mills that are in the upper part of the city, Knapp, Stout & Co. and Schulenberg & Boeckler's are much farther from the river than that saw-mill is at that point?

A. Yes, sir.

Q. Take Schulenberg & Boeckler's saw-mill, that you state was some twelve hundred feet from the water's edge; assuming that map to be correct, and the distance seven hundred feet, Schulenberg & Boeckler's saw-mill would be back about where my finger is, and that other saw-mill, that is half a mile from the river, would be back about this distance, would it not?

A. Yes, sir; that is correct.

Q. Now, at the time, Mr. Ludlow, that you erected this saw-mill were there any other saw-mills in this neighborhood?

A. You mean in that part of the city?

Q. Yes.

A. No, sir.

Q. Are there any there now?

A. No, sir.

Q. At that time were these saw-mills in operation in the north part of the city?

A. Yes, sir.

Q. These mills that I have designated as Schulenberg & Boeckler's and Knapp, Stout & Co.?

A. No, sir; not the last one; not Knapp, Stout & Co., but there was a mill located on the same site that has been pulled
47 down, and Knapp, Stout & Co. built on it.

Q. There was at that time a mill at that place where Knapp, Stout & Co.'s mill is now?

A. Yes, sir; about the same distance from the river.

Q. About the time you selected this site and put up your saw-mill, the mills in the north part of the city were at those distances from the water's edge of which you speak?

A. Yes, sir.

Q. The bank for some distance above and below you at that time was of about the same general character?

A. Yes, sir.

Q. A saw-mill could have been built in here or there or all along there, couldn't it?

A. Well, no; on account of the space required. The mill requires so much ground, so far as character of the bank is concerned, there was room.

Q. There was room for a good many mills?

A. Yes, sir.

Q. But none were put there?

A. None were put there.

Q. You have undertaken to state, or you have told me, what

profits you made. For instance, you say, "I made $1,500 the first year, or part of it."

A. Yes.

Q. And the second year, you say you made—

WITNESS: Seven or eight thousand.

Q. And the third year, fifteen thousand?

A. Yes.

Q. Now, isn't it a fact, that when you speak of profits, you mean profits depending upon the business of manufacturing and selling lumber? Depending upon the prices at which you sold?

A. Varied somewhat.

Q. And the prices at which you sold logs?

A. Somewhat. Well, the margin on the logs was about the same.

Q. In this estimate of profits you have included everything connected with the business, haven't you?

A. No, sir; oh, no. Oh, you mean what I speak of as having made myself?

COUNSEL: Yes.

A. Oh, yes, sir.

Q. You included everything connected with the business?

A. Yes, sir; the net profits of the business.

Q. The price paid for logs, the price at which you sold the lumber, the price you paid for labor, all these estimates entered into it?

A. Yes, sir.

48 By Mr. MYERS:

Q. I understand you to say that the profits you referred to were these net profits?

A. Net profits.

Q. The profits over and above your business expenses?

A. Yes, sir.

Q. You have testified in that connection to certain statements made to you by the plaintiff in respect to the profits of Myers & Vahlkamp?

A. Yes, sir.

Q. Have you any knowledge or information as to what their private expenses were, as to whether their private expenses exceeded the business profits?

A. I rather think they did; they both lived pretty well, spent a good deal of money.

Q. A good many men lived pretty well about that time, I believe?

A. Yes.

Q. Now take this plat again for a moment; you stated, as I understand you, that this dotted line indicated the original shore line, the place of the bluff bank?

A. Yes, sir.

Q. And the effect of the dyke was to make land in front of plaintiff's property?

A. Yes, sir.

Q. Extending northwardly?

A. Yes, sir.

Q. What sort of land was made?

A. Mud and quicksand.

Q. Such as you speak of?

A. Yes, sir.

Q. Passable or impassable?

A. A portion of it near the high bank would be passable; the rest would be impassable.

Q. You stated in your direct examination how far out that mud deposit extended from the original shore line, I believe?

A. Yes.

Q. Now, I will ask you to state whether or not there is any deposit of that sort of mud sediment between the water and line, and the original shore line, between the present water line and original shore line of the property over which, and at which Schulenburg & Boeckler, and Knapp, Stout & Co. got their logs.

A. No, sir; good ground, and has been for years.

Q. Is it passable then to get logs where they get them?

A. Yes, sir.

Q. And in fact they do get them?

A. Oh, they do get them at a very heavy expense.

Q. But I understand you it is impossible to get them at this point?

49 A. No; can't be got there.

Q. Are you very familiar with the *modus operandi* whereby Schulenburg & Boeckler manipulate their logs?

A. Yes, sir.

Q. They have a reservoir of nearly a block in extent, between the river bank and their mill site, have they not?

A. I don't know that, sir; it is possible; know they handled their logs by a car hauling them out of the river bank, by a separate steam engine and men would roll them on the car and bring them up; I haven't been in that part of the city for the last two or three years.

Q. How far north are they, Schulenburg's mill?

A. I don't know the street; I know the mill; I can go right to it.

Q. About how far north of Olive street?

A. Oh, it is ten or twelve blocks.

Q. North of Madison street, isn't it?

A. It is below North Market street to Madison; I think it is Madison street.

Q. How as to Knapp, Stout & Co?

A. In what respect?

Q. Are you familiar with the manner in which they procure their logs?

A. Yes; well, in this much: I was familiar with the manner in which the logs were gotten out by the former firm that run the same mill; I presume they do it in the same manner.

Q. How was that?

A. They had a regular steam locomotive to rehaul the logs out.

Q. About how many locomotives could you haul over this mud deposit in front of Myers & Vahlkamp's mill?

A. Well, I don't know; hardly a one-twentieth part, I should say.

Q. You couldn't run very many at once, could you?

A. Oh, no; that wouldn't bear anything at all, except planks.

Q. You were questioned with respect to the relations which Mr. Myers and Mr. Vahlkamp sustained towards yourself?

A. Yes, sir.

Q. Without going into details, I want to know whether or not anything ever occurred between you and either of them, of which you ever complained, or felt that you had cause to complain of?

50 A. No, sir; nothing ever happened of that sort, sir; our relations were always friendly.

By Mr. BELL: Mr. Ludlow, did you state there is no made grounds in front of the mills in the north part of the city, Schulenburg & Buckner, and Knapp, Stout & Co.?

The WITNESS: No, sir; if I stated so I didn't understand the question.

Q. That was the question Mr. Myers asked you.

A. Oh, yes, there is; I know that, for I have milled in the north part of the city a good many years myself.

Q. Isn't it a fact that in the north part of the city there is a wide strip of ground made in that way?

A. Yes, sir; very wide strip; been made in the same way.

Q. In this deed, Mr. Ludlow, from you and from Westlake, there is a consideration expressed of $11,500, which, it is said, was paid to you and Francis M. Ludlow by Westlake?

A. Yes, sir.

Q. Tell us how that was paid.

(Obj. to.)

The COURT: I don't think it is material.

Mr. BELL: The deed itself is in evidence here, and it contains the statement that $11,500 was paid. I propose to show there wasn't a dollar paid.

The COURT: I don't think it is material.

Mr. BELL: The deed itself is in evidence here, and it contains the statement that $11,500 was paid. I propose to show that there wasn't a dollar paid.

The COURT: I don't think it is material whether there was or not.

(To which ruling defendant saves an exception.)

By Mr. MYERS: You understand that there is made ground that gets finally to be ground solid and passable?

A. Yes.

Q. And that there is a soft mud and sediment which may be christened made ground, which is impassable?

A. Yes, sir.

Q. Do you mean to have the jury understand that this made ground in the northern part of the city that you refer to is at all like the sediment that has been created in front of the plaintiff's premises?

A. No, sir; I stated, in answer to that question, that the
51 ground was good up there. It is made ground, but it is good; just as good traveling as anywhere in the city most of the time.

Mr. BELL: You mean it is good now?

A. Yes; I mean now.

Q. But it is made by exactly the same process that is now being undergone in front of your old mill?

A. Yes.

Mr. BELL: Made in the same way?

Mr. MYERS: In respect to this property in the northern part of the city that has been added to the original shore line, has it been macadamized—rocked?

A. Yes, sir; I believe part of it has. I am not certain about that. It is all good sort of ground, though.

Mr. BELL: That is, where the wharf is improved and built up, then?

A. Yes, sir.

Q. Just as it will be done here?

(Obj. to.)

The COURT: He has explained that.

Manderville Seymour's Testimony.

Plaintiff called MANDERVILLE SEYMOUR, who, being duly sworn, testified as follows:

Q. Please state your age.

A. Sixty-four (64).

Q. How long have you lived here?

A. Since 1844.

Q. What business have you been engaged in?

A. Saw-mill business.

Q. For how many years?

A. Ever since 1844, until 1872, when my mill was burned.

Q. In this city?

A. Yes, sir.

Q. Do you know plaintiff?

A. Yes, sir.

Q. Were you acquainted with his premises—his saw mill premises at the river and at the foot of Bryan street, in this city?

A. Very well.

Q. How frequently did you visit them?

A. Oh, three or four times a year.

Q. During what years?

A. Well, 1865, '66, '67, '68, and '70.

Q. And from that time on?

A. I had done more or less business with Myers. I was down there 3, 4, 5, or six times a year.

Q. To any great extent?

A. Well, in the way of lumber business. Whenever I had little bills to saw that I couldn't fill I would get Mr. Myers to assist me, and *vice versa*.

Q. Do you remember the building of the dike of which we have spoken?

A. Yes, sir.

Q. Do you remember the situation of these premises before
52 that dike was built?

A. Very well.

Q. Will you describe to the jury the nature of the bank then, at that point, in front of the plaintiff's premises?

A. It was a bluff bank.

Q. How high?

A. Well, thirty or thirty-five feet.

Q. Very perpendicular?

A. Nearly so, right at the mill.

Q. What was the nature of the bed of the river?

A. Rocky bottom.

Q. Did it or did it not join that bluff bank?

A. Yes, sir.

Q. Was it a flat or sloping bottom?

A. Sloping bottom.

Q. Solid rock?

A. Solid rock.

Q. Where was the natural channel of the river at that time?

A. Well, it was right in the front; it wasn't so rapid upon the shore as it had been years previous. At that time boats ran right along near there.

Q. Was it a dangerous current?

A. No, sir.

Q. How near the bluff bank would boats pass in passing up and down the river?

A. Well, owing to the stage of the water.

Q. In an ordinary stage?

A. Passed within fifty or sixty feet.

Q. How in high water?

A. In high water they came as near as they felt safe in doing it; as near as they would feel safe in doing it; within twenty-five feet if they choose.

Q. Do you remember how the plaintiff got his logs from the river up to the saw-mill?

A. Very well.

Q. State to the jury how that was?

A. They got the logs loose from the raft, and they dropped right down into the boom at the mouth of the ways, drove hooks in and hauled them right up into the mill.

Q. With respect to the cost of handling the logs, how did that mill site compare with others about the city?

A. It was the best mill site on the bank.

Q. Around the city?

A. Yes, sir.

Q. The Iron Mountain track was near the edge of this bluff bank, I believe?

A. Yes, sir.

Q. And the log-way of which you spoke passed throug a culvert under that track?

A. Yes, sir.

Q. Do you know how it was fastened, if at all, to the rock bottom?

53 A. I know from experience it must have been fastened down to the rock with iron bolts. I have fastened them that way myself.

Q. You don't know from your personal knowledge how that one was?

A. No, sir.

Q. That log — was an inclined slide?

A. Yes, sir.

Q. How wide was it?

A. I should judge about eight feet, may be 10—sufficient to haul up three logs abreast.

Q. What was fastened to the logs to haul them up?

A. A line.

Q. What was used?

A. Hooks were driven into the logs and a line made fast to the hooks.

Q. Rope?

A. Yes, sir.

Q. Worked by machinery at the mill?

A. Yes, sir.

Q. What additional facility could there have been to make the handling of the logs any easier than they could have been handled at that place?

A. I have never seen any facility more easy than that. The logs went directly from the river right into the mill—right into the saws.

Q. Well, what was the character of what I might term the outfit in and about the mill for conducting the saw-mill business, in a general way? What was its character, without going into details?

A. It was good; it was good all around the mill.

Q. Bryan street was the southern boundary of this lot, I believe?

A. I believe it was.

Q. This dyke commenced at Bryan street; do you know how far out into the river it extended?

A. Well, I have seen the statement in the papers frequently, but I don't remember the date.

Q. Without reference to that, you have seen the dyke, I understand?

A. I have seen it.

Q. And seen the deposit?

A. Yes, sir.

Q. What would your judgment be as to how far out it extended?

A. Oh, the last time I was out there I should judge it would take

a nine hundred-foot line to reach a log. I have thrown out a great many check lines, and I judge a two and a half or three inch check line would take nine hundred feet to reach a log. I didn't
54 measure anything. Just throwed my eye a little.

Q. The building of this dike threw the water line east from its original location, I believe, towards the Illinois shore?

A. Yes, sir.

Q. How far from the bluff bank did it throw it?

A. Well, as near as I could judge, six or seven hundred feet at the dyke—grew narrower as it went up.

Q. Grew narrower as it came north; then it was widest just in front of the mill site?

A. Yes, sir.

Q. Just at the dyke it was widest and narrowed as it approached the Arsenal?

A. Yes, sir.

Q. What was the character of the deposit that was left between the original shore line, that is between the bluff bank and that shore line that was left after the building of the dyke?

A. About the same. The sediment of the Mississippi river is partially quicksand and soil of different things.

Q. What was its depth as near as you could approximate it?

A. Well, I never knew the exact depth of the river there. If I did I could tell.

Q. I don't ask for its exact depth.

A. Well, it looked to me as if there were fifteen or twenty feet of sediment there the last time I was there.

Q. Was it hard or soft?

A. Soft.

Q. Where was the sediment deposited with reference to the dyke, at the dyke or near the Arsenal?

A. It was about the water level as it ran up. The face surface of it was about on the water level.

Q. Was it shallower at the dyke than it was near the Arsenal?

A. The depth?

Q. The depth of this deposit?

A. No, sir.

Q. Was it deeper?

A. Well, whatever that fall was in the river it would be that much deeper.

Q. Was it passable or impassable?

A. Well at times it would be impassable, at other times you could walk over it. After the river had been high you couldn't walk on it at all. If the river remained low for a long time
55 you could walk over it if you were right careful.

Q. The river at certain periods rises and falls, and at each time leaves a deposit, does it?

A. More or less.

Q. At certain times you say the crust of that deposit would bear the weight of a human being?

A. Well, if they didn't walk over it too many times. You might pass once or twice maybe.

Q. Would it bear any greater weight, such as the weight of heavy logs?

A. Well, the weight of a log in the mud is not like any other weight; such as, for instance, a human being—a human being would sink in while you could snake a log through.

Q. In pulling a log over that wouldn't the necessary result be that the point or nose of the log would dive down into this deposit?

A. Frequently the case.

Q. To what extent from the bluff bank would the crust of this deposit bear the weight of a human being? How far out from the bluff bank?

A. Well, that is owing entirely to how long it has been dry.

Q. And to, I suppose, the state of the weather?

A. Yes, sir.

Q. In hot or dry weather, if it has been exposed for some time, it would be harder than at other times?

A. Yes.

Q. Ordinarily, how far out could one walk from the original bluff bank?

A. Well, sometimes the mud is softer near the bluff bank than it is out at the river. It dries and becomes hard as soon as the weather passes off. In falling the quicksands and sediment of the Mississippi becomes the hardest next to the water's edge.

Mr. MYERS: I didn't know that.

WITNESS: That is it.

Q. Well, how deep is that crust?

A. Oh, well, it is owing to the weather. Sometimes it is very shallow and other times stronger.

Q. And to the time it has been exposed, I suppose, of course?

A. It is becoming harder and harder gradually, I presume, by time.

Q. How is that?

56 A. Well, I should judge it would. If the dikes were raised, of course, the more sediment got in there; the higher the sediment got, the more it would drain out and become hard; as the dike now stands, it is between wind and water, and is never dry and never wet only when the river is over it.

Q. Did this dike come to the surface of the river?

A. At times you can see it.

Q. There were times when the dike protruded above the surface of the river?

A. Very little; in spots.

Q. Now, where was the channel thrown after the building of the dike?

A. Thrown away around the end of the dike towards the Illinois shore.

Q. On which side of Arsenal island?

A. I have never been on Arsenal island. I presume——

COUNSEL: I thought perhaps you knew. I don't want you to state except of your own knowledge. What is the nature of the current just outside of the present shore line made by this mud deposit?

A. Well, it is not rapid at all.

Q. Is it stagnant for any distance out from the mud deposit?

A. Well, partially so; partially so. Not decidedly stagnant, a little current there all the while.

Q. What would its depth be for twenty feet out from that mud deposit?

A. Well, I could not tell that.

Q. With what facility can logs be handled there now with that mud deposit there?

(Objected to, as immaterial.)

The COURT: You can ask the question.

Exception noted.

Question read.

The COURT (to witness): After this deposit was formed, Mr. Myers, and from the time of the building of the dike, steadily down to the present time?

A. Well, I will make an explanation right there; if I am not incorrect. After my mill was burned in 1872, the spring of 1873 I was looking around for business to see what I could take hold of, and I was down at Myers' mill, and he had a raft of logs lying on that deposit.

57 Mr. BELL: When was that?

WITNESS: That was in the fall of 1873, if I am not mistaken.

Mr. BELL: That was before the dike was built, Mr. Myers; the fall of 1874 you mean?

WITNESS: Yes, fall of 1874; my mill was burned in March, 1874, and in the fall of 1874 I was down there and he wanted me to take a job. I asked him what? He said getting his raft out of the mud. I made him an offer what I could get it out for, providing he would let me get it out when I pleased, any time between that and the first of next March; and I went over it with him and examined the mud and found that I couldn't do nothing at all until I got cold weather and the mud froze. During that time I had sold my teams. He didn't take me up at the offer, and I never had anything to do with it. It was impossible to handle them all then. Of course they were most of them got out during that winter; but it is impossible to handle logs now, from the fact that the mud rises just that height between wind and water, so that you can't use the place at all as a log landing between high water and low-water mark.

Q. Might get them out of the ice, but couldn't out of the mud?

A. Yes, sir.

Q. Chop them out? Now, you say you have been in that business for many years; do you consider yourself qualified to form an

opinion as to what that lease hold term was worth just prior to the building of that dike, assuming that it had about six years to run, say five years and a half to run in that time?

A. Well, I had some conversation with Mr. Myers at that time.

Mr. BELL: You needn't state now what Mr. Myers said to you at that time.

Mr. MYERS: Just answer my question, Mr. Seymour.

Mr. BELL: I object to his answer; further, as to giving his opinion as to the value of that property.

Mr. MYERS: I think Mr. Bell is right in that objection, so
58 that I will amend my question and avoid the technical objection. I will just add this to the question: assuming that the lease had to run until the first day of January, 1880, and that the rent referred to in the lease was $575 per annum, payable in equal quarterly instalments, on the first days of April, July, October, and January of each year, the lessee tenant to pay these taxes on the property, and all assessments, whether general or special?

The COURT: You may answer that question, Mr. Seymour.

(To which ruling defendant excepts.)

WITNESS: You mean the condition that the mill was in before the dike was put there?

Q. The dike being put there in July or August, 1874, I want to know whether you consider yourself competent to form an opinion as to what that particular leasehold was worth just before that dike was built?

(Defendant objects to witness stating whether he considers himself competent.)

The COURT: My recollection is the witness stated he had been in the milling business a good many years.

Mr. MYERS: Since 1844.

The COURT (to witness): Have you been in the business here in the city?

A. Yes, sir; I had a leasehold at the time my mill was burned dowd in the northern part of the city.

The COURT: He may answer that question.

WITNESS: The mill property there, for the use of it is worth seven thousand dollars a year; every expense paid outside excepting that amount to be paid for the privilege of that mill.

Q. Did you have a general knowledge of the value of that sort of property in and about where this property is located?

A. Well, I have been on the bank since 1844 every spring.

Q. You did have a general knowledge of the value?

A. Yes, sir.

Q. Now, I will ask you what was its value immediately after the dike was built?

59 (Objected to by defendant, as incompetent and irrelevant.)

A. That is, before taking?

Q. That is, "before taking" and "after taking."

The COURT: The objection will be overruled and exception saved by defendant.

A. The mill as a mill for saw-mill purposes wasn't worth (snapping his fingers) that.

Q. What do you mean by that?

A. Not worth a snap of my finger.

Q. Well, it was worth nothing as a saw mill; would you have taken it to pay the rent and taxes?

A. No, sir.

(Objected to.)

Cross-examination:

Q. Mr. Seymour, the mill and machinery were worth just as much to remove at the end of the leasehold term after the dike was built as before it, were they not?

A. I looked at the mill as being worth seven thousand dollars a year previous to the dike being built. After the dike was built it was worth anything to tear it down for old iron; that is all. If it was worth a thousand dollars it was worth that.

Q. You have been asked to give the jury an opinion of the value of a leasehold. Now the lease under which that leasehold was created provides that at the expiration of the lease the mill improvements and machinery may be removed by the lease. Now, my question is this: Did the construction of this dike at all effect the value of the improvements there—the saw-mill, machinery, etc., so far as they were of any value for the purposes of removal at the end of the leasehold term?

A. No, sir; not so far as regards removal.

Q. Therefore the injurious effect that the dike produced on this property was all embraced in the fact that after the dike was built it was less accessible and convenient to haul the logs from the river into the mill; that was the whole thing, wasn't it?

A. Yes, sir.

60 Q. And in your judgment before the dike was built the property was worth seven thousand dollars a year, and after the dike was built it was worth nothing; that is what you stated?

A. Yes, sir.

Q. In other words, you think before the dike was built this property for which Myers & Vahlkamp paid six hundred a year they could have rented to you or anybody else for seven thousand; they were actually paying about sixty-five hundred less than the real value of the property?

WITNESS: I don't mean to convey that, that six hundred dollars was all the expenses that they paid. They had to pay a good deal more than that in order to make the mill free for a person to take it in the rough.

Q. But Myers & Vahlkamp were in possession of this mill at the time the dike was built, were they not?

A. Yes, sir.

Q. Under this lease they were paying six hundred dollars a year to Mrs. Boyce; your notion is that they could have leased the same property to you if you wanted such property for seven thousand dollars a year and have made a profit of six thousand four hundred a year on the transaction without doing anything or investing any capital or anything else?

A. Well, no; I don't think they could have made that much clear.

Q. Therefore aint it true when you talk about the seven thousand dollars a year that you are talking about the property and the value of the business of manufacturing lumber in that property; that you think the manufacturing of lumber as it could be carried on as the property existed before the dike was built would be represented by seven thousand dollars a year profit; is that what your mean?

A. I mean the mill—a man to take the mill from Myers & Vahlkamp with the appurtenances attached, which he offered to
61 me—was worth seven thousand dollars. He asked me more than that. I think it was worth seven thousand dollars all considered.

Q. Do you mean that a man renting from Myers & Vahlkamp would pay seven thousand dollars a year rent?

A. Yes, sir.

Q. And Myers & Vahlkamp therefore would out of that pay six hundred dollars to Mrs. Boyce, and have a profit of sixty-four hundred dollars; that is is your statement?

A. They would pay any claims that was against the mill. I would have nothing outside to pay.

Q. You would pay that seven thousand dollars, and they would pay the ground rent and taxes?

A. Insurance and water, and such like.

Q. What water?

A. Their apparatus for pumping water was very expensive.

Q. That is in the mill, ain't it.

A. Well, it is included with the mill, of course.

Q. What would they pay on account of that?

A. I think I paid three hundred and seventy-five dollars one year.

Mr. MYERS: License?

A. Yes, sir.

Mr. BELL: They pump the water right out of the Mississippi river, don't they?

A. They did so rather take it from the city.

Q. Then there wasn't any license to be paid?

A. The machinery and apparatus was there to provide it.

Q. To pump the water out of the river?

A. Yes, sir.

Q. Very well, then; there wasn't anything to be paid for the water?

A. That is the consideration which would be in the rent. If I had rented the mill it would be a great consideration.

Q. That would make the property worth so much more?

A. Yes, sir.

Q. Now, wasn't the character of the bank along there in 1874, when this dike was built above and below this mill, about the same thing, so far as its being a bluff bank, so far as the river running right in front of it, and all that sort of thing?

A. Well, from the mill up to the arsenal the bank was very regular, and below that the bluff came right out to the river.

62 Q. How far below it?

A. Well, within six or eight hundred feet, I think.

Q. Isn't there a distance there—isn't there a stretch of country there of a thousand or fifteen hundred feet all of the same character so far as that bank is concerned and its proximity to the water?

Mr. SHEPLEY: Do you mean below?

Mr. BELL: Right along where this mill is situated, say it commenced right up above the arsenal and right south of the mill, did'nt it?

A. Very short distance south.

Q. That stretch of ground there, a thousand or twelve hundred feet, was about the same character?

A. Yes, very much the same character.

Q. And there was room there for a good many mills, wasn't there?

A. Well, not well. It would be trespassing on the arsenal ground.

Q. I mean the stretch of country, exclusive of the arsenal ground?

A. You could put a mill there, but you couldn't land logs there. Wouldn't be of any avail.

Q. Why not?

A. Couldn't land logs there; couldn't use it.

Q. Why?

A. If you couldn't land logs what would be the use of the mill? Might put a dozen mills there.

Q. Why couldn't you land logs?

A. Because you would be on other peoples' property.

Q. So were Myers & Vahlkamp on other peoples' property, weren't they?

A. Well, the Government wouldn't allow it.

Q. You are talking about the arsenal property?

A. Of course.

Q. I am not talking of that; I am talking of that ground commencing at the south line of the arsenal and running south past the mill of Myers & Vahlkamp. Wasn't there a stretch of half a mile, perhaps, all of the same character, having the same frontage on the river, and having equally the same for saw-mill purposes, as this spot occupied by Myers & Vahlkamp?

A. There wasn't so much above or below to operate a mill.

Q. Why not?

A. Because you are beyond the Government ground.

63 Q. How far is it from Bryant street to the arsenal?

A. I couldn't tell you the exact distance; I have heard.

Q. Do you know the width of the lot occupied by Meyers and Vahlkamp on the river front; how many feet wide it was?

A. I have heard to-day the ground they leased.

Q. What did you hear?

A. I heard it in testimony.

Q. What did you hear; what was its width on the Mississippi river?

A. Not quite two hundred feet.

Q. Take the next two hundred feet immediately north of there; wasn't that equally good for a mill site?

A. Two hundred feet; Mr. Meyers never operated on two hundred feet.

Q. I didn't ask you whether he operated on 200 feet or 2 feet. I ask you whether the land immediately adjoining Meyers' property on the north was not equally good for saw-milling purposes?

A. So far as the mill is concerned; but you couldn't get rafts there.

Q. Why not?

A. Because you get on Meyers and Vahlkamp's ground or the Government ground.

Q. You mean to swear Meyers and Vahlkamp were bound on the north by the arsenal ground, do you?

A. I couldn't swear anything positive about that.

Q. Why did you say so a minute ago?

A. I heard to-day the amount of the ground leased.

Q. Did you hear anybody say to-day that they were bound on the north by the arsenal ground?

A. No, sir.

Q. Then why do you persist in saying that if one were to put a saw mill on that lot immediately north of Meyers and Vahlkamp the saw-mill would be on the arsenal ground?

A. The rafts would reach to the arsenal ground.

Q. You mean that the rafts extended up the river some ways?

A. The rafts must lay above the mill.

Q. Suppose the rafts extended out in the river and only covered the actual front, 200 feet, or whatever it is?

A. That is a supposition you can't sustain. You couldn't hold them there.

Q. Couldn't do business that way?

A. No, sir.

64 Q. How far did Meyers and Vahlkamp's rafts extend above their premises?

A. Generally about one thousand feet.

Q. Then the fact is Myers & Vahlkamp were occupying some eight hundred feet river front to which they were not entitled at all?

A. I don't know about that.

Q. Assuming that the owner had two hundred feet front on the river under their lease, they occupied, in addition, eight hundred feet, did they?

A. To land a pine raft we want a thousand feet of ground. Every mill wants it and has it. They are bound to have it.

Q. Will you answer my question?

A. Well.

Q. If Myers & Vahlkamp occupied one thousand feet from Bryan street north, as you say they did, don't you?

A. They must have done so.

Q. Very well; but if they only had two hundred feet on the river from Bryan street north, then they were occupying a front of eight hundred feet that belonged to somebody else?

A. I don't know whether it belonged to somebody else or whether he had a lease to it.

Q. I am assuming that. The whole question is based on the assumption that their lease only covered two hundred feet. If that is true, that their lease only entitled them to two hundred feet river front north of Bryan street, then they didn't have ground enough there to do a saw-mill business, did they?

A. Two hundred feet was not sufficient.

Q. You swear that every saw-mill ought to have a thousand feet at least of river front?

A. Yes, sir.

By Mr. MYERS:

Q. I didn't quite understand your answer to the value of that building as a wreck—machinery as a wreck—after the building of the dike. What did you say in regard to that, as to what it was worth?

Objected to.

The COURT (to witness): You may repeat any statement you made in regard to that in the direct examination or cross-examination.

WITNESS: What the mill was worth after the dike was built?

65 COUNSEL: Yes.

A. Well, I think I stated that there was nothing that it would be worth; nothing more than a wreck; worth nothing for saw-mill purposes.

Q. Well, did you make any mention of any sum that it would be worth as a wreck? I ask you simply did you mention any sum?

A. I don't know, but I said a thousand or five hundred, or something; whatever any one might feel disposed to give for it. I wouldn't make any statement in regard to that.

Q. Did I understand you, that you offered Mr. Myers that?

(Objected to. Objection sustained.)

At this point the court adjourned until to-morrow, March 21st, 10 a. m.

ST. LOUIS, *March 21st.*

Court met pursuant to adjournment, and case on trial progressed as follows: Plaintiff's counsel offers in evidence city ordinance No. 8560, being an ordinance to improve the harbor opposite Bryan street.

City Ordinance No. 8560.

12. 8560.

An ordinance to improve the harbor opposite Bryan street.

Be it ordained by the city council of the city of St. Louis: SECTION 1. The city engineer is hereby authorized and directed to construct a stone *speer* dyke, eight feet above low water, to connect the present high bank of the Mississippi river, east of the Iron Mountain railroad, with the east line of the wharf, as established by ordinance fifty-four hundred and three, at the foot of Bryan street, in a linear continuation with the south line of said street.

SECTION 2. The sum of twenty-five hundred dollars is hereby set apart out of the harbor fund for the construction of said dyke.

Approved July 11th, 1873.

66 *J. Pitzman's Testimony.*

Plaintiff then called JULIUS PITZMAN, who, being duly sworn testified as follows:

Q. State how long you have resided in this city, and what your occupation is.

A. I am in St. Louis about twenty-four years; have been a surveyor and engineer since that time.

Q. Mr. Pitzman, did you ever have anything to do with making a survey of this lot of land? If so, state when, and whether you made any plat.

A. Yes, sir; I made a survey of the property described in that lease.

Q. When?

A. This map doesn't show the date, but I think it was about a year or two ago—within the last one or two years.

Q. Did you make a plat of it?

A. Yes, sir.

Q. Is that it (handing same to witness)?

A. This is the plat of the survey I made.

Q. As made by you?

A. Yes, sir.

Q. Did you find any dike there? And, if so, describe it.

Mr. BELL: That plat was made in '77, Mr. Pitzman, wasn't it?

A. I say about one or two years ago. I don't recollect the date.

Defendant objects to the plat, as being made 3 years after the suit was commenced.

The COURT: He can answer if he found the dike there.

WITNESS: When I made a survey of the premises described in the lease there was a dike, known as the Bryan street dike, built from the embankment of the railroad eastwardly, and extending into the river about six hundred feet.

Q. Was the location of that dike as it then existed correctly put down on that plat?

A. Yes, sir; just as it was at that time.

Q. What was the extent of that dike at the time you made this examination and measurement from the bank of the river east?

(Defendant objected, as incompetent and irrelevant; and its objection being overruled, it duly excepted to all of this testimony.)

A. From six to seven hundred feet. The dike extended from six to seven hundred feet from the railroad embankment eastwardly to the river, and the main direction is about the eastern extension of Bryan street.

67

Q. How did it correspond with Bryan street; was it on a line with Bryan street, or if it deviated, state how?

A. It commenced at a point in the southern portion, where the southern part of Bryan street strikes the railroad, and then it didn't follow precisely in continuation of the line of Bryant street, but deviated 20 or 30 feet to the south.

Q. Was the eastern end in any portion of it coincident with the extension of Bryan street at all?

A. No, sir; it was not; I say the eastern end is about probably forty or sixty feet south of the southern line of Bryan street.

Q. The whole of it?

A. Yes, sir.

Q. What portion of the western end of the dyke covers the eastern end of the street?

A. For a distance of about a hundred feet east of the railroad embankment the dyke was built upon the street within the line of the street.

Q. And the eastern end of the dyke—how much did it cover of Bryan street—the whole of it or a portion of it?

A. No, it did not; no portion of the eastern five hundred feet was in the street.

Q. But the western—was the whole of the western end of the dyke coincident with the eastern; did it begin so that the western end of the dyke was coincident with the eastern end of Bryan street, or was it deflected; was a portion of it south of the east end of Bryan street?

A. Well, the base of the western end of the dyke was a little south of the southern line of Bryan street; but taking the breadth on top it was about fifteen or twenty feet; it was in front of Bryan street, with the base extending south of the southern line of Bryan street, near the railroad embankment; it is correctly shown on this map.

Q. What was the condition of the river at the time you made this examination?

68

(Defendant objects to testimony to condition of affairs three years after the commencement of the suit. Objection was overruled and exceptions saved.)

A. There was a sand-bar formed east of the old embankment, which existed for the last ten or fifteen years, filled in.

Q. Will you point out where that sand-bar was at that time?

A. There; here (indicating on plat), this line, being a line about

a hundred feet east of the eastern rails of the railroad, is the old shore, which is comparatively unchanged from 1860 to 1870, at the time this saw-mill was operated; this other line, being a line of about 200 feet east of the old shore line, was the river line when I made the survey. I had better work those lines A and B so they can be recognized.

Q. State that over again—those lines—so that the reporter can get it down with reference to those marked with letters.

A. The lines A B upon this plat of my survey, being about a hundred feet east of the Iron Mountain railroad, represent the old shore line as it existed from about 1860 to about 1870, changes in the shore line at the time being very trifling. The line C D on the plat of my survey represents the shore line as it existed as I found it on the day I made the survey, which line is about two hundred feet east of the old shore line.

Q. Below the dyke, Mr. Pitzman, the line colored blue, what does that represent?

A. The line designated by letters A E upon the map are the water line as it existed from 1860 to 1870, and also the same line of the river—the line of the river as I found it the day I made the survey.

Q. Therefore, according, to your judgment, south of the dyke there has been no change in the shore line, except in reference to the change of the depth of water?

A. No; there has been no change in the shore line, no ma-
69 terial change. Of course there are slight changes constantly, the river rising.

Q. Does the line A B represent the original bank, as you stated, at high or low water?

A. Which line do you refer to?

Q. A B, what you call the original line above the dyke.

A. Well, it is below high-water mark. The line A B is probably fifteen feet below the high-water mark. The line A B is probably fifteen below the high water of 1844 and 1849.

Q. Then you would say it represents the original line of the river in fair navigation?

A. Fair navigation; yes, sir. That bank is hardly ever water, except in very high water during short periods. The line designated by letter A B.

Q. Will you state what you found the condition of the soil there from the line A B out to the line C D, as represented on your map?

A. It is filled in with sand, the sediment of the river—partly quicksand.

Q. Was there standing water on it, or what was its condition?

A. There was no standing water on it, but part of it was very wet, so you couldn't stand on it. It was very wet, and at the same time gave way. I went in, running the shore line. I came very near being lost.

Q. In undertaking to walk on it?

A. Yes, sir. It gave way, and I got in about two or three feet into liquid mud and sand.

Q. Did you get out alone, or were you assisted out?

Objected to by defendant.

The COURT: You may describe the condition of the soil.

Exceptions saved by defendant.

A. I know the condition was such that I couldn't have got out unless I had been assisted by my men.

Q. Did you make any examination to ascertain the depth of the deposit there at that time?

A. Yes, sir; I took levels at the time, but they are not represented on this map.

Q. Well, as a matter of fact, what did they prove—what
70 did they establish, do you recollect? If so, state it.

A. I took soundings east of line C D, in order to ascertain the depth of the water, but I don't recollect precisely the result. If you place your question more definite, I might be more able to answer it.

Q. Was it deep or shallow east of the line C D? Was the water deep or shallow?

A. It was a gradual slope, getting deep towards the eastern end of the dyke.

Q. I want to ask you if you made any soundings or examinations to ascertain the depth of the deposit west of the line C D, up to the line A B?

A. No, sir; I did not; made no borings there.

Q. Could you, from any indication, form a judgment of what the depth of the deposit was there?

A. No; I couldn't have made an estimate without examining the maps made by the U. S. Government or by the city, of prior soundings. Soundings made by the city, as well as the U. S. Government, would show the difference in the elevation.

Q. As to the depth of water, did you sound any water but just at the foot of the dyke, along the line A B? How far up did you sound; along the line C D, I mean?

A. I took soundings up as far as Harney street, being about half a block north of this land of Myers & Vahlkamp.

Q. What was the result?

Objected to.

The COURT: What was the question?

Mr. SHEPLEY: I asked the soundings along the line C D. What was the depth of water in front of the line C D, and how far north?

The COURT: You may answer that.

A. I do not recollect distinctly; cannot testify on that.

Q. What was the condition of the dyke at that time, as to whether its entire length north was covered with water or not? How much of it was covered?

A. The dyke extending from the point A to the point marked F.

Q. Will you show that to the jury, please?

Mr. BELL: Is that plat admitted in evidence? I objected to it once, and I didn't understand that it had been ruled upon.

71 The COURT: It was shown to the jury yesterday without objection.

Mr. SHEPLEY: I propose to offer it in evidence.

The COURT: I think the plat is admissible.

Exception saved by defendant.

Pitzman's Plat.

(Here follows map, marked page 71.)

WITNESS: That part of the dyke extending from the old shore line from the point marked A to the point marked F, being about 280 feet in length, was above water. That point of the dyke from point F to point G, being about the same length of 280 feet, had sunk, and it was soft mud below water, and then the point that part of the dike extending from G to H, being about 150 feet in length, was above water again, probably in its original height.

Cross-examination:

(Plat handed to witness.)

Q. Mr. Pitzman, on this plat the Bryan street dyke is indicated there and here is the shore line?

A. Yes, sir.

Q. You may state whether or not that represents the matter?

A. It appears to me that upon this map the location of the Bryan street dyke is shown to be about twenty feet further north than where it is in point of fact.

Mr. BELL: This plat is on a much smaller scale than the one you have been talking about, and, of course, the deflection of the dyke from the line of the street wouldn't be as apparent on this plat as on this.

WITNESS: No.

Q. What I wanted to get at is whether the general idea is represented?

A. Very nearly, within a very few feet of the correct location.

Q. This wharf line represents the outside of the wharf line, does it not?

A. It represents the proposed wharf line, as the city contemplated it.

72 Q. Doesn't that represent the wharf line as it was established by ordinance No. 5433.

A. If you give me that ordinance, I can tell.

COUNSEL: Yes, I will give you the ordinance.

Counsel reads ordinance 5433.

Q. Do you find it?

WITNESS: Yes.

Q. The question I ask is, whether the line indicated on that plat as the eastern line of the wharf is described in this ordinance?

Mr. MYERS: Which line do you refer to?

Mr. BELL: The red line.

Mr. MYERS: There are two red lines here.

Mr. BELL: Let the witness point out the line that is intended to represent it.

Mr. MYERS: I want to object to the question in the form it is put.

Mr. BELL: I will ask the witness whether the line described in Ordinance No. 5433 is indicated on this plat he is looking at?

WITNESS: It is indicated on this map.

Q. Well, show me where it is.

A. The line described in the ordinance which you have just read is the western line of the levee. It is this red line, the western of the two red lines, or the eastern line of the property, when it is improved.

Q. The outside red line represents what?

A. That would represent the line of the eastern line of the wharf, when it is finished.

Q. How wide is the wharf?

Mr. BELL: The question I ask is, whether the space represented or included within these two lines—is not the proposed wharf three hundred feet wide?

WITNESS: It is the proposed wharf under that ordinance.

Q. I understand you to say, Mr. Pitzman, that the effect of the dike was to cause ground to be made immediately north of it?

A. Yes, sir.

Q. That, of course is produced by stopping the current of the river, and allowing the sediment to settle in there?

A. Yes, sir.

Q. That is the way ground was made?

A. Yes, sir.

Q. It is a gradual process, isn't it?

A. Well, it is very hard to answer that question. What do you mean by gradual?

73 Q. Does it take place instantly; the moment the dike was created did the ground appear, or was it the work of months?

A. It generally took place within a month. That was during the high water.

Q. In this instance do you know how long it had been undergoing this operation, or was it still making ground when you visited the place two or three years after this suit commenced?

A. No; when I made this survey I think it was rather washed away, owing to the gap in the dike.

Q. Part of the dike had been taken away before you visited the premises?

A. Yes; part carried away in consequence probably of the construction of the Choteau avenue dike on the opposite side of the river, the current being swifter and washing it away.

Q. Is the Choteau avenue dike indicated on this map?

A. No, sir; but the dikes built by the Cahokia and St. Louis Ferry Co. are indicated here.

Q. How many of those dikes were there?
A. There were three dikes.
Q. Were they there when you visited the premises?
A. Yes, sir; I built them.
Q. What was the effect of those dikes on the river?
A. I do not think those dikes effected it. The effect on the channel of the river was in consequence of the dikes on Choteau avenue.
Q. Was that built at that time?
A. Yes, sir.
Q. Did you build that?
A. No, sir.
Q. What effect did that have?
A. It had the effect of throwing the water over to this side, and probably washing away a portion of that dike, and deepening the water again in consequence of it.
Q. Wasn't the object in constructing this Bryan street dike to make ground out to the wharf line; wasn't that the very purpose of the dike?

Objected to by plaintiff.

The COURT: That is the same question we had yesterday. I don't think it is material.

Mr. BELL: I want to show that this is a thing that proceeded along nearly the whole of the river front, and that the entire
74 northern part of the city has been built in that way. I would like to go into these matters if your honor will let me.

The COURT: I don't think it is material.

Mr. BELL: In order to save the point I will ask Mr. Pitzman if he knows anything about the construction of ground in the northern part of the city by this process?

(Objected to by plaintiff and sustained, and defendant excepts.)

Q. What was the effect of the dyke, Mr. Pitzman, so far as the lot of ground described in this lease is concerned—the building, machinery, etc.? What I desire to ask you is this: Whether the construction of the dyke at all inflicted any physical injury upon the ground itself or upon the building. Whether it threw any sand or mud upon the premises occupied by the saw-mill, or whether the effect of the dyke was simply to fill up the ground outside in the river?

Mr. MYERS: We don't allege that anything was deposited upon this particular lot, nor do we allege that the building, as such, was destroyed, or that the machinery, as such, was destroyed.

The COURT: There is no claim that the building is hurt, or that the land is hurt, otherwise than the accumulation of this mud.

Mr. MYERS: Otherwise than the accumulation of this mud and the deviation of the river. We don't claim for anything but the destruction of the riparian right and the loss of logs that is in controversy.

The COURT: Does that admission satisfy you, Mr. Bell?

Mr. BELL: Oh, yes.

Q. Mr. Pitzman, at the time you was there what year was it? Please fix it, if you can.

A. As near as I can tell you, it was about two years ago.

Q. That would be in 1877. What time in the year was it?

A. I couldn't tell. My testimony in the last case would show.

Mr. BELL: I haven't your testimony. Can you tell me
75 whether in the winter or summer or spring or fall?

A. I am rather inclined to think it was summer.

Q. Was the saw-mill running at the time?

A. No, sir.

Q. Was anybody in possession of the saw-mill?

A. Mr. Myers pretended to be the owner.

Q. Mr. Myers was with you at the time?

A. Yes; I went down with him.

Q. Mr. Myers employed you to make a survey?

A. He did.

Q. John Q. Myers?

A. Yes, sir.

Q. And paid you for it?

A. And paid me for it.

Q. And with the understanding that you were to testify in this case?

A. That was not the understanding; I received the order, and I considered it the natural consequence.

Q. Was it told you what the survey was for?

A. He told me the object was to illustrate to the jury in the case the location of the mill with reference to the Bryan street dyke. Of course, in order to make the survey, it was necessary to know the object.

Q. That he had a suit pending against the city in which he wanted to use this plat?

A. He had, or intended to bring a suit against the city for damages.

Q. The saw-mill wasn't running at the time?

A. No, sir.

Q. Were there any other saw-mills around there?

A. Not in the immediate vicinity, that I know of, that I recolect.

Q. This lease that you were looking at a little while ago, that calls for one hundred and sixty-two feet front on the Mississippi river?

A. Yes, sir.

Q. Were you ever down there when Myers & Vahlkamp or Myers alone was running this saw-mill—carrying on the business?

A. Yes; I have been down there occasionally.

Q. Do you know how much in the river was taken up with their rafts—how many feet?

A. No, sir; I could recollect.

Q. You have never observed that?

A. I made the survey of the Harney line and the Clemmens line north and south of that, but, of course, I didn't pay any attention to the logs?

Q. About how far is it from Bryan street to the south line
76 of the arsenal grounds?

A. Over a thousand feet.

Q. You don't know whether they occupied that thousand feet—the river part of it I mean—for floating their logs—their rafts?

A. No; I know on the river bank there were logs scattered all about.

Q. I am talking about logs in the river?

A. No, sir; I do not.

Q. Are you acquainted with the northern part of the city where Schulenburg & Boecklers saw-mills are?

A. Yes, sir.

Q. And Knapp, Stout & Co.'s?

A. Yes.

Q. How far is Schulenburg & Boeckler's saw-mill from the water's edge?

A. I don't know; I made the survey after the saw-mill was built and I don't recollect how far it extended now from the river bank.

Q. Twelve (12) or thirteen hundred feet, ain't it?

A. I couldn't tell you; I don't know on what portion they built the saw-mill.

Q. Knapp, Stout & Co.'s; are you acquainted with that?

A. With reference to the river bank, I couldn't tell you how far it is back.

Q. You know it is some distance back?

A. I know it is some distance back; I don't know how far.

John P. Kaiser's Testimony.

Plaintiff called JOHN P. KAISER, who, being duly sworn, testified as follows:

Q. Please state your age and business.

A. Forty-five (45); superintendent of the Memphis Packet Co.

Q. In this city?

A. Yes, sir; I reside in St. Louis; have resided here since about 1852.

Q. Have you been identified with river interests during that entire period?

A. Yes, sir—whole time.

Q. Are you familiar with the nature of the Mississippi bank on the Mississippi shore, just below the arsenal in this city?

A. Yes, sir.

Q. What sort of a bank was that prior to the building of the Bryant-street dyke?

A. A rocky shore—rocky shore from the arsenal clear down to Carondelet—gradual shelving; gradual incline to the deep water.

Q. A rocky bottom, wasn't it?

77 A. Rocky bottom; yes, sir.

Q. As to the shore itself, what was its character; flat, low shore?

A. Yes, sir.

Q. Or was it a bluff bank?

A. Not a bluff bank. It was a gradual incline to the river.

Q. Do you rember the shore just in front of Myers & Vahlkamp's saw-mill?

A. Yes; I have been on there freqently.

Q. Do you remember the bluff bank along there?

A. No, sir; not in low water it wasn't bluff. In high water it would come up pretty steep.

Q. In high water it was a bluff bank?

A. Yes, sir.

Q. With reference to that bank, where did the water flow in when the river was at a high stage?

A. Immediately along down the shore from the arsenal—along the shore all the way down.

Q. Along the bank?

A. Along that bank.

Q. How near that bank would the boats pass?

(Objected to by defendant, as immaterial, and objection overruled and exceptions saved.)

A. The channel of the river at that time was right immediately down the shore at the time the dyke was built. The dyke, in fact, was built right across the channel.

Q. The dyke was thrown right across the natural channel of the river?

A. Right across.

Q. What became of the channel of the river, or where did the channel pass to just after the dyke was built?

Objected to by defendant, as immaterial, and objection overruled and exceptions saved.

A. The channel shortly after that went to the left of Arsenal Island—between Arsenal Island and the Illinois shore.

Q. What was the depth before the building of the dyke along the Missouri shore?

A. Well, right immediately along the shore I think the water was pretty—on the reef; it would vary in low water from six to eight feet.

Q. Along the shore?

A. I think probably twelve or fifteen feet of water there.

Q. What was the nature of the current as to whether or not it was rapid or dangerous or otherwise?

78 A. The usual current of the river when right in the channel.

Q. At that point?

A., Yes, sir.

Q. How far east of the bluff bank was the water edge thrown by the building of that dike?

A. About six hundred feet, I think. The end of the dike was about six hundred feet, I think.

Q. I want to know how far east of the bluff bank the water's edge was thrown by the building of the dike.

A. Well, in low water I should suppose two or three hundred feet further out in the river.

Q. Do you know the character of that sediment and deposit that filled in that place between the bluff bank and that water's edge as it existed after the dike was built?

A. The usual deposit in the Mississippi of sand and mud.

Q. Hard or otherwise?

A. Well, some times it was hard, not usually so. Sometimes it became hard, and other times again it is soft and muddy. Gradually gets hard after remaining a good while.

Q. Was it deepest nearest the dike or towards the arsenal; I mean the sediment or deposit?

A. Immediately above the dike and below it also.

Q. Just at the dike?

A. Just at the dike and below the dike; yes, sir.

Q. The deposit was deeper than up towards the arsenal?

A. Yes, sir.

Q. And where it extends further out from the bluff bank along the dike and up towards the arsenal?

A. Near the dike almost in front of the saw-mill.

Cross-examination:

Q. There were some dikes built in Illinois about this time, were there not?

A. Yes, sir.

Q. The Cahokia dike?

A. The Cahokia dike was built opposite.

Q. Was there a dike also built at Choteau avenue on the Illinois side opposite Choteau avenue?

A. Yes; there had been a dike some time ago, built before the Bryan-street dike, what they called the Pittsburgh dike.

Q. What was the effect of the Pittsburgh dike upon the
79 river? Did that throw the volume of the water on the Missouri shore?

A. Well, don't know that it did. It seemed to be a channel clear across from shore to shore; it narrowed up the channel of the river.

Q. Take hold of the east end of the map, Captain. This is supposed to be the Bryan-street dyke—there Arsenal Island. These are supposed to represent the dykes of the Illinois shore?

A. Yes, sir.

Q. Were these dykes on the Illinois shore built at the time the Bryan street was built, or afterwards?

A. The Pittsburgh dyke was built previous to that.

Q. This is the Pittsburgh dyke; the Pittsburgh dyke is way up here somewhere; it ain't indicated here.

WITNESS: I think they had another dyke there at the time they built these lower dykes; I don't recollect whether they had that or not.

Q. There was a dyke upon around here some place on the Illinois

shore at the time this dyke was built, and still further up was the Pittsburgh?

A. Yes, sir.

Q. And these Cahokia dykes have been built since?

A. I don't recollect.

Q. Where is the channel of the river now?

A. It is around the end of the Bryan-street dyke; comes around the dyke and into shore bank again.

Q. Is that the channel used by boats between here and the South?

A. Yes, it is now; last year the Government built a dyke across this channel, shutting this out.

Q. The United States Government did that?

A. Yes; forcing the channel round Bryan-street dyke.

Q. Before the U. S. Government built this dyke around here the channel went east of Arsenal Island?

A. Yes, sir.

Q. There it was driven back west of Arsenal Island by the Government building the dyke there?

A. Yes, sir.

Q. And now here is the channel?

A. Yes, sir.

By Mr. MYERS:

Q. You say the Government built the dyke out from the Illinois shore, extending toward Arsenal Island?

80 A. Clear across; they built a dyke across there almost.

Q. Why was that?

A. In order to throw the channel back to the Missouri side.

Q. Why?

A. I don't know, sir.

Q. This Bryan-street dyke had thrown the channel east of Arsenal Island?

A. Yes, sir.

Q. The Government undertook to throw it back?

A. To throw the channel back.

Mr. BELL: And succeeded?

A. And succeeded.

Mr. MYERS: Then Bryant-street dyke was prejudicial to the navigation of the river?

(Objected to.)

(Objection sustained.)

Q. What the effect of the Bryan-street — on the navigability of the river?

(Objected to.)

(Objection sustained.)

O'Neil and Tobieski's Testimony.

Plaintiff called JAMES O'NEIL and TOBEISKI JOLLY, who testified substantially to the same effect as witness.

Thomas P. Morse's Testimony.

Plaintiff called THOMAS P. MORSE, who, being duly sworn, testified as follows.

Q. What is your age?
A. Thirty-one (31).
Q. How long have you lived in this city?
A. Twenty-three (23) years.
Q. Do you know the plaintiff?
A. Yes, sir.
Q. Are you acquainted with his saw-mill at Bryan street?
A. On the river?
Q. Yes, sir.
A. Yes, sir.
Q. Do you know the Bryan-street dyke?
A. Yes, sir.
Q. Do you remember when it was built?
A. I think so; nearly.
Q. What has been your business in this city?
A. Well, it has been docking and repairing of boats, and building of boats and saw-mill business.
Q. Did you ever visit the premises of Myers & Vahlkamp?
A. Yes, sir; frequently.
Q. Will you state to the jury the character of the bank there just in front of his saw-mill.
A. The character of the bank now?
Q. No; as it was before; just before the dyke was built.
A. Well, the Iron Mountain railroad track run alongside in front of his mill on the river side.
Q. How high a bank is it?
A. I suppose that was twenty-five or 30 feet high.
Q. Was it nearly perpendicular?
81 A. Yes, sir; almost. There was an embankment there just as the natural falling would make it.
Q. What was the bed of the river? What was its nature and character?
A. It was a rocky bed along there.
Q. Rocky bottom?
A. Yes, sir; rocky bottom.
Q. Sloping?
A. No; I think it went in rather abruptly.
Q. Solid rock bottom?
A. Yes, sir.
Q. The channel lay along that shore, I believe?
A. Yes, sir; tolerably close to the Missouri shore all the way down.
Q. Do you remember how the plaintiff used to get his logs from the river up to the saw-mill?
A. Yes, sir; he laid his rafts close in along the bank, laid there, and had his boom come in at the lower end of his ways; cutting his logs out of the raft they would float down into his ways, and then

fastened his line on, which was connected with the bull-wheel in the middle, and pulled them out of the river directly into the mill.

Q. Upon the inclined slide?

A. Yes, sir.

Q. That slide passed under the railroad track?

A. Under the railroad track.

Q. Through a culvert?

A. Yes, sir.

Q. You say you were tolerably familiar with the mill?

A. Yes, sir.

Q. Been through it pretty often?

A. Well, I went through it once with the idea of going into the concern.

Q. Well, do you consider yourself of what such property was worth in this city in a general way?

A. I think so.

Q. I will ask you to state what, in your opinion, was the value of that leasehold term of those premises as the mill stood just prior to the building of that dyke, the lease having to run until the first of January, 1880, and the lessee being under obligation to pay an annual rent of five hundred and seventy-five dollars, payable quarterly, and being under an obligation to pay the taxes and assessments upon and against that property?

(Objected to by defendant, as incompetent and irrelevant. Objection overruled, and defendant excepts.)

82 A. I don't understand exactly what you mean—whether you mean the value of the lease of the entire mill and the appurtenances belonging to it, and the grounds connected with it, or simply the grounds.

Q. No, I mean simply the value of the leasehold, assuming that just prior to the building of the dyke the plaintiff owned on that property, which lease would not have expired until the first of January, 1880, and he desired to sell his whole interest in the lease on the mill and its appurtenances as it stood, that is not considering any articles of personal property, taking only the fixtures, the purchaser to have the full use of the mill.

WITNESS: And also of the river front?

COUNSEL: Certainly.

Mr. BELL: I object; he has no use of the river front.

The COURT: Considering the premises just as they were situated before the dyke was built?

Mr MYERS: With the use of the river?

(Objected to by defendant, as incompetent and irrelevant.)

(Objection overruled, and exception saved by defendant.)

A. I should judge it would be worth from ten and twelve thousand dollars a year; don't know exactly what the capacity of that mill was, owing a great deal to that. For a mill turning out twenty thousand feet of lumber a day ought to be worth that.

Q. And what in your opinion was its value immediately after the building of the dyke?

(Objected to, as incompetent by defendant, and exceptions saved by defendant.)

A. It wasn't worth anything for a saw-mill site.

Q. How, in respect to the facility with which logs could be got out of the river at that point for saw-milling purposes, how did that mill site compare with others about the city?

(Objected to by defendant, as incompetent and irrelevant, and objection overruled and exceptions saved by defendant.)

A. That was the best mill site, in my opinion, in the city of St. Louis.

83 Q. Have you been there since the dyke was built?

A. Yes, sir; that is, I havn't been on the ground, but I go by there every day, almost.

Q. Now, do you know how far east of the bluff bank the water line has been thrown by the building of that dyke?

A. Three weeks ago; three or four weeks ago; I was out there.

(Obj. to.)

The COURT: Well, after the dike had accomplished its purposes in the way of filling the front there, if it did fill the front, to what extent did it push the water line east?

A. Well, at different stages of the water it is different distances.

Mr. MYERS: State at different stages.

A. In low water I should judge it was four hundred feet; it was that way about 3 or 4 weeks ago, before the river rose; it has raised six or eight feet since then, and it is now probably two hundred feet; it shelves gradually out from the railroad track out; it is a gradual slope.

Q. Do you know the character of the deposit left between that water line and the bluff bank?

A. Well, it is soft immediately after the river falls, very soft.

Q. With what facility could logs be handled in that deposit?

A. I wouldn't want to handle any logs there.

Q. Could they be handled there?

A. They might, but the expense would be more than they were worth.

Q. I mean could they be handled with any profit?

A. No, sir; of course I suppose it can be done as a physical fact.

Q. There is a possibility of doing anything?

A. Yes, sir.

Cross-examination:

Q. When Mr. Myers was using the property for his saw-mill his rafts extended from the foot of Bryan street north, did they?

A. Yes, sir.

Q. And the logs were taken out from the south end of the rafts?

A. Yes, sir.

Q. And hauled up?

A. Yes, sir.

Q. That is the way the thing was done?

A. Yes, sir.

84 Q. How far north of Bryan street would the raft extend; how many feet in the river?

A. Well, it was according to how much stock he would have, and how fast his logs would come in.

Q. At any time?

A. They would generally extend up pretty close to the lower end of the arsenal wall.

Q. Then he was practically using something like a thousand feet of the river with his rafts?

A. I should judge he was from eight hundred to a thousand feet.

Q. In order to use his saw-mill, as it was built there, it was necessary that he should use the river in that way; that is to take his logs from the southern end of his rafts, wasn't he?

A. That is the way it was used; that is the way I would use it.

Q. That was the practicable way of doing the business?

A. Yes, sir.

Q. It wouldn't have been practicable, Mr. Morse, for him to have occupied only one hundred and sixty-two feet front there with his rafts immediately opposite his land, would it?

A. No; I don't think he could have handled the logs for that mill on one hundred and sixty-two feet.

Q. The only way in which he could handle logs for the mill was by occupying more space in the river than his lease called for on the front?

A. I don't know what it called for.

Q. It called for one hundred and sixty-two feet, running from Bryan street north?

A. He would have to have front enough to hold his rafts, and the raft would be two or three hundred feet long.

Q. And they have to lie lengthwise along the bank?

A. Yes, sir; laid lengthwise; sometimes put two of them abreast.

Q. The saw-mill now is much nearer the waters edge than Schulenburg & Boecklers' saw-mill is it not?

A. Yes, sir.

Q. And considerably nearer than Knapp, Stout & Co.?

A. Well, Knap, Stout & Co. haven't had any mill at all

85 until recently.

Q. Well, they have got one. There was one where it stands now?

A. I understand they were going to start up Hill, Lemmon & Co.'s mill, but didn't know they had done it.

Q. That stood a much greater distance from the river's edge than this mill, didn't it?

A. Yes; all the mills in the city, in fact, stand out from the river than this one does not.

Q. How was the milling business after the panic? Did it affect it any?

A. I can't tell you, for I failed in the panic, and don't know.
Q. Were you engaged in the saw-milling business?
A. Yes, sir; from 1868 to 1873.
Q. Have you been engaged in any business since?
A. Yes; I have been engaged since, and am now in the docking business here.
Q. But you have had nothing to do with the manufacturing of lumber?
A. Well, we were manufacturing lumber of our own in our own mills at the time. Don't manufacture to sell.
Q. You were acquainted with the prices of lumber since 1873?
A. Yes, sir; I think I am.
Q. Isn't it a fact that lumber has been steadily declining since 1873?

Obj. to, as immaterial.

The COURT: I think you are entitled to show whether the milling business has been generally profitable from 1860 to 1870.

Q. Isn't it a fact, Mr. Morse, that the saw-milling business in St. Louis, like every manufacturing business here, has suffered from the panic of 1873?

Objected to; overruled.

A. Well, I can't answer that.
Q. You mean you don't know?
A. No, sir; I don't know.

S. Alford's Testimony.

Plaintiff called S. Alford, who being duly sworn, testified as follows:

Q. What is your age?
A. I am 38.
Q. How long have you resided in this city?
A. Since 1864.
Q. What has been your business here?
A. Lumber business.
Q. Are you in that now?
A. Yes, sir.
Q. Were you acquainted with the mill-site of Myers & Vahlkamp, at the foot of Bryan street?
A. Yes, sir; I have been there.
86 Q. Do you remember the nature of the bank at that point?
A. Yes, sir.
Q. Before the dyke was built?
A. Yes; I remember it well; before—yes; I believe I do.
Q. You know the dyke, do you—this Bryan street dyke?
A. Yes; I saw it.
Q. How high was that bank before the dyke was built?
A. Well, I should think it was probably twenty (20) feet—something like that—when I saw it.

Q. Was it nearly perpendicular?
A. Well, it was a pretty steep bank.
Q. What was the nature of the bed of the river, if you know?
A. I should judge it was rocky.
Q. The channel lay along the shore, did it?
A. I don't know about that.
Q. Have you been there since the dyke was built?
A. Yes, sir.
Q. Do you know how far east of that bluff bank the water's edge has been thrown by that dyke?
A. Well, I went down there to look at the mill and the mill site, and when I was there it was pretty low water, and I think it extended, probably—well, it might be a hundred feet or so, when I saw it.
Q. You didn't make any actual measurement?
A. Oh, no; no, sir.
Q. Were you familiar with the various mill sites about this city?
A. Well, I have been to them all, I think.
Q. You know them all?
A. I think so.
Q. With respect to the facility with which rafts of lumber could be handled at the mill site of Myers & Vahlkamp prior to the building of the Bryan street dyke, how did that mill site compare with others about this city?

Objected to by defendant, as incompetent.

Objection overruled, and exception saved by defendant.

A. I think very favorably with the others.

Cross-examination:

Q. Are you in the lumber business now?
A. Yes, sir.
Q. You have been in it continually since 187–?
A. Yes, sir.
Q. How was the business of manufacturing lumber in St. Louis afflicted by the panic?
A. Well, sir, I am not a manufacturer, and therefore know very little about it.
Q. Can't answer the question?
A. No, sir.
Q. Has the price of lumber declined since 187–?
A. Yes, sir; been gradully declining.
Q. What is the price of lumber now as compared to the prices in 187–?

Objected by plaintiff, as irrelevant, and objection sustained by the court, and defendant excepts.

Q. You sell lumber, don't you?
A. Yes, sir.

Mr. BELL: As the gentleman can tell us the effect on manufactur-

ing, it seems to me I am entitled to have the prices, so I can discuss the matter with the jury.

The COURT: It don't necessarily follow that because the price of lumber has declined that the business of manufacturing has declined. It is not sufficiently relevant to this case.

Mr. BELL: Will your honor permit me to ask the witness whether or not it is a fact that there has been a very serious decline in the price of lumber since 1873? With that I will stop.

Mr. MYERS: I object.

The COURT: I don't think it is relevant, Mr. Bell. If he knows anything about the profitableness of operating mills since 1874, he can state.

And thereupon defendant excepted to the ruling of the court.

Mr. BELL (to witness): Will you answer that whether you know anything about the profitableness of operating saw-mills since 1873?

A. I have no knowledge of the earnings of saw-mills in St. Louis at any time.

Q. What is your business, Mr. Alford?

A. I buy and sell lumber.

Q. Do you buy and sell lumber manufactured here or manufactured elsewhere?

A. No, sir; not manufactured here.

Q. You don't handle any lumber manufactured in St. Louis?

A. None at all; no, sir.

Silas Atkins' Testimony.

Plaintiff called SILAS ATKINS, who being duly sworn, testified as follows:

Q. What is your age?

A. Fifty years.

Q. What is your business?

88 A. I am at present inspector of steamboats for the board of underwriters.

Q. How long have you lived in this city?

A. About sixteen years.

Q. Have you been engaged in that business all the time?

A. No, sir; I have not.

Q. What business have you been engaged in?

A. Saw milling most of the time. Building boats and saw milling. All kinds of saw milling attached to the business.

Q. Are you acquainted with the saw mill site of Myers & Vahlkamp?

A. Very well, sir.

Q. How do you come to be acquainted with it?

A. I have been there a great many times, and given them a great many orders that our own mill couldn't cut.

Q. Do you know the Bryan street dyke?

A. I do.

Q. How was the bank in front of plaintiff's saw mill just before that dyke was built?

A. Well, the dyke comes down, probably, at first, and then goes off in a gradual slope about an angle of 30 degrees; did before it was built. Before the dyke was built there was an abrupt bank about fifteen feet, and there was a gradual sloping shore about 30 degrees until it struck the river.

Q. About how high was that bank?

A. From where the gradual slope stopped it is about fifteen feet up probably. I think it sloped out at a moderate stage of water about one hundred feet.

Q. What was the nature of the bottom?

A. Very pretty shore. Rocky bottom, perfectly smooth.

Q. Solid rocky bottom?

A. Yes; about thirty degrees, I should think.

Q. Where was the natural channel of the river?

A. Well, the boats always ran close to the Missouri shore.

Q. What was the nature of the current at that point?

A. Well, I never noticed that.

Q. What facilities were enjoyed there for saw milling purposes?

A. I think they were very excellent always.

89 Q. With respect to the facilities and economy and cheapness with which logs could be handled at that point before that dyke was built, how did it compare with other mill sites about the city?

(Objected to by defendant, as incompetent and irrelevant. Objection overruled, and defendant duly excepted.)

A. It was known as the best site in the country.

Q. How was that affected by the fact that the mill was but a short distance from the water?

A. They only had one handling; had no rehandling; only one handling did all the business. That is why it was better than other mills, because he could handle so much cheaper; because he had only one handling, instead of two or three.

Q. Do you remember the inclined slide by which the logs were drawn from the river to the mill?

A. Yes, sir.

Q. How far east of that bluff bank was the channel of the river thrown by the building of that dyke?

A. Do you mean how far out the mud had accumulated afterwards? Because you have got to take into consideration the condition of the river and stage of the water.

Q. State it your own way.

A. I suppose the mud built out there may be two hundred and fifty feet probably.

Q. What was the character of that deposit?

A. Well, of course, it was soft after the river left it.

Q. With what facility and what degree of cheapness and economy could logs be handled to that deposit?

A. I don't see how they could be handled at all, except at great expense; more than would have paid.

Q. What, in your judgment, was the value of that leasehold term

just prior to the building of the dyke, the lease having to run until the first of January, 1880, the dyke being built in June and July, 1874, and the tenant being under an obligation by the lease to pay a ground rent of 575 dollars, payable in equal quarterly installments, and being also under an obligation to pay the taxes
90 with all the appurtenances and fixtures of the mill?

(Objected to by defendant, as incompetent and irrelevant. Objection overruled, and defendant duly excepted.)

WITNESS: You mean how much a year for six or eight years?

Q. State it your own way, Mr. Akins.

A. When that dike was built that mill would have been cheap at ten thousand a year.

Q. What in your judgment was it worth immediately after the dike was built?

(Objected to by defendant, as incompetent and irrelevant; and objection overruled, and defendant duly excepted.)

A. Well, it would have cost so much to get the logs out there afterwards. I don't think it would be a very desirable mill.

Q. Answer the question more nearly, if you can. What was the market value of that lease?

(Objected to by defendant, as incompetent and irrelevant; and objection overruled, and defendant duly excepted.)

A. I wouldn't think anything of it, that is for saw-mill business.

Q. I say for the saw-mill business?

A. Not anything at all, I should say.

Q. What connection, if any, did the location of that mill site with reference to its being in the southern part of the city and its being on the river edge, have upon the value of that leasehold?

(Objected to by defendant, as incompetent and irrelevant; objection overruled, and defendant duly excepted.)

A. Well, that is wherein the value was, by reason of being contiguous to the river, and only one handling of logs; and there being only one mill in that section of the country for the kind of lumber Mr. Myers made was why he made it valuable.

Q. Do you know the depth of that mud deposit in front of that bluff bank, caused by that dike?

A. I don't know; it is very deep, though, now.

Q. About what depth?

A. I think fifteen or twenty feet in the deepest place.

Q. Were you a very large purchaser of lumber from Mr. Myers?

91 A. Yes; we have given orders as high as a million feet that we couldn't cut ourselves.

Cross-examination:

Q. How were the logs handled at the mill; were they taken from the southern end of the rafts?

A. That is owing to what kind of a log he wanted. If he found a log he wanted outside, he would take it on the outside of the raft.

Q. Did the rafts lay north of Bryan street, or south?

A. The lower end of the raft would lay right immediately in front of his log-way, and then he would have a boom below his log-way, and take just such logs as he wanted.

Q. How much space did they occupy in the river?

A. When the rafts came down in the spring, and he would have a quantity, they would run nearly up to the arsenal wall.

Q. How far from Bryan street?

A. I think three hundred yards—some such matter.

Q. Did he occupy this space in the river south of Bryan street?

A. No, sir.

John Hussman's Testimony.

Plaintiff called JOHN HUSSMAN, who, being duly sworn, testified as follows:

Q. How old are you?

A. Fifty-eight.

Q. How long have you lived in this city?

A. Since 1845.

Q. What is your business?

A. Engineer.

Q. Were you employed at the saw-mill of Myers and Vahlkamp?

A. Yes, sir.

Q. For how long?

A. About twelve or thirteen years.

Q. When did you quit there?

A. Until the mill couldn't go no more.

Q. You were there until the mill stopped?

A. Yes.

Q. How soon after the dyke was built did the mill stop?

A. Well, about a year, because you couldn't get no logs out.

Q. Were you trying during the time to get logs out?

A. Yes, sir; but we couldn't. The logs went in straight up and down, and then we couldn't get no line to fasten, and we couldn't go with a skiff, and couldn't go with planks on that end to get them.

Q. Couldn't get them at all?

92 A. No; and what we did get never paid for the trouble—couldn't pay the expense.

Q. Were there any logs there at the time the dyke was built?

A. To be sure; plenty.

Q. What became of them?

A. Well, there was a heap carried away across the dyke in the lower places, and we couldn't get them back again.

Q. About how many were lost?

A. Well, I couldn't tell you; it is hard to tell; they went away by night and by day.

Q. You can form no opinion how many?

A. No, sir; I know many; I have seen them by night and day.

Q. Can you come near to how many?

A. No, sir; it is hard to tell, because a man to say how many must know it, and I couldn't say; there was a heap of mire and one thing and another.

Q. How high was that bank just in front of the mill?

A. Well, it was in some places 5 feet high above the water.

Q. How far out did this mud deposit extend from the bank after the dyke was built?

A. About three hundred feet.

Q. How deep was the mud?

A. Well, some places eight feet.

Q. Was it hard?

A. No, sir; gravel and sand on top and mud below—soft mud.

Q. How about the difficulty of getting water to run the mill after the dyke was built?

(Objected to by defendant, and as not being an element in the case.)

The COURT (to witness): Where did you get the water from for the mill; out of the river?

A. Out of the river; and after the dyke was built the pipes got down into the mud.

The COURT: I will let him answer.

(The defendant duly excepted.)

A. I had to go through the dyke to get water on the other side of the dyke.

Q. Well, what difficulty did you have in doing that?

A. I had to put other pipes on it; I couldn't get the pipes out of the mud no more; we tried it by the bull wheel, and I couldn't get them out by the bull wheel; couldn't draw them, they were so deep in the mud and mire, and had to leave them stay, and I had
93 to get new pipes laid across the dyke.

Cross-examination:

Q. Mr. Hussman, you knew Mr. Rapp, the gentleman sitting here at my right?

A. Yes, sir.

Q. He was employed by the city as an engineer, and had charge of this dyke?

A. Yes; so he told me.

Q. You saw him out there frequently?

A. Yes, sir.

Q. Talked to him about this matter?

A. Yes, sir.

Q. The construction of the dyke was going on for some time?

A. Yes, sir.

Q. It was commenced in July and August, 1874?

A. Yes, sir.

Q. And it was finished until when?

A. Well, I couldn't tell that; I believe about a half a year or so after.

Q. Wasn't it commenced in the winter of 1873, in December; wasn't the first work done on the dyke in December, 1873, and then wasn't it continued the following spring and summer and completed about August, 1874?

A. I don't remember about what time.

Q. Weren't they at work at it for some six or some months?

A. I couldn't tell.

Q. Took a good deal of time to put all this stone in there, didn't it?

A. Yes.

Q. Don't you remember they were hauling rocks all the winter on the wagons?

A. Yes, sir.

Q. And they continued to work on it the spring and summer, until near the fall, when it was completed?

A. Yes; I remember, because they bothered me all the time, so I could get no water to run the machinery.

Q. Did the mill continue to run for a year after August, 1874?

A. Well, I don't remember how long it was.

Q. Don't you remember when you stopped work there?

A. Yes; I remember we stopped.

Q. Was it in 1875 that you stopped?

A. I don't know.

Q. You stated the mill ran about a year after the dyke was completed?

A. Yes; we had logs on hand inside.

Q. Answer my question. Didn't you say the mill ran about a year after the dyke was finished?

A. No.

Q. How long did it run after the dyke was finished?

94 A. I couldn't tell—not exactly, because a working man aint got no business with such things.

Q. A working man has business to know what occurs around him.

A. Well, I didn't take no notice about such business, because I always attended to my own.

Q. That was your business, because if the mill stopped you had no place there; can't you tell when it was that you ceased working for Myers?

A. Yes.

Q. When was it?

A. I worked for him so long as he had work for me, and I know he couldn't run the mill any more, and he had to stop.

Q. When did he stop?

A. Oh, I didn't count the day.

Q. Who did you go to work for next?

A. For nobody.

Q. Who are you working for now?

A. For nobody.

Q. Have you done any work since you stopped working for Myers?

A. No, sir.

Q. How do you live?

A. I live upon my own.

Q. You have property?
A. Yes, sir.
Q. Are you living on that property?
A. Yes, sir.
Q. Do you live in the neighborhood of this mill?
A. No, sir.
Q. And you never worked for anybody else since you worked for Mr. Myers?
A. No, sir. That's all.
Q. Never worked for anybody since that time?
A. No, sir. I got the rheumatism from working in that water so bad I couldn't work the first year, because I had to go so deep in the water.
Q. Don't you remember you talked with Mr. Rapp down there about those logs?
A. I don't know whether I did.
Q. He was in your mill there and talked to you, didn't he?
A. Maybe he asked me something, and I gave him an answer.
Q. You asked him what he was doing down there, didn't you?
A. No, sir. I seen he was a city engineer at that time.
Q. And you saw the city was building a dykethere?
A. To be sure.
Q. And you saw the dyke was built?
A. Yes; I was mad enough about it, but I couldn't help myself, because I had to stand it.
Q. Mr. Myers was there every day?
A. Yes; and I told Mr. Myers that dyke was bound to break him.
Q. And it did break him?
A. Yes, sir.
95 Q. This was going on for months?
A. Yes, because what he had to saw.
Q. And you and Myers saw this and knew it was going on, didn't you?
A. Yes; and I looked every once in a while into the river, because I was engineer and I had time; I had my fireman.
Q. Well, now, do you remember having a conversation with Maj. Rapp, down there, about these saw logs, in which you told him that about all of them had been gotten out?
A. No, sir.
Q. Do you remember that, sir?
A. No, sir.
Q. Did you have any such conversation?
A. We had some logs laying——
COUNSEL: I am asking you about conversation with Maj. Rapp, not about the logs.
A. I had not much conversation with him, because I wasn't much acquainted with him; I said, "good day, Maj. Rapp," and so and so; that's all.
Q. Do you swear you never spoke with Maj. Rapp about logs?
A. Maybe I said something about logs; I don't know; I didn't keep that in my mind.

Q. Do you swear you never told Maj. Rapp the logs had all been taken out?

A. No, sir; never did.

Q. Never said that to him?

A. I don't believe that——

Q. Not at any conversation you had with him down on the premises?

A. Because that wasn't so.

Q. Do you say you did not say it?

A. Maybe we had.

Q. Maybe what?

A. Not until the dyke was pretty near finished; they had some rocks there.

Q. Do you deny ever having told Maj. Rapp that the logs were all taken out of the river?

A. Because I couldn't tell him.

Q. Couldn't tell a lie?

A. No; because I couldn't tell him; may be some in there yet in the mud.

Q. Then you say you did not tell that the logs were all out?

A. I couldn't tell him that.

Q. Did you ever have any conversation with him about it?

A. Maybe he asked me and I gave him an answer so and so.

Q. You did talk to him about the logs?

A. That may be if he asked me.

Q. What did you tell him if he did ask you?

96 A. Well, I couldn't remember that now any more.

Q. You don't remember what you told him?

A. No; because Mr. Myers tried his best to get the logs, and get them so good as he could, but it never paid him.

COUNSEL: Exactly; but that aint what I'm asking you about at all. I am asking you about that conversation with Maj. Rapp.

A. Might talk to him something, but I don't know what.

Q. Your statement now is that you don't remember what it was that you told Maj. Rapp?

A. No, sir.

Q. You have no recollection on that subject?

A. No, sir; and I ain't got no business to talk that way about logs with him.

Q. How many years did you work for Mr. Myers?

A. Well, I worked about thirteen years.

Q. Did he owe you anything at the time you quit?

A. No, sir; he paid me to the last cent.

Q. Does he owe you anything now?

A. No, sir.

Q. Have you ever worked for him since?

A. No, sir.

Q. Have you any interest in this matter?

A. No, sir.

Q. Were you interested in his business there?

A. No, sir.
Q. How much a day did you receive?

(Objected to as immaterial. Objection sustained and exception noted.)

Chas. Busch Testimony.

Plaintiff called CHS. BUSCH, who, being duly sworn, testified as follows:

Q. What is your full name?
A. My name is Charles Busch.
Q. Did you work at the mill that we have been talking about?
A. Yes, sir.
Q. How long did you work there?
A. Worked there eleven years.
Q. Did you work up to the time it stopped?
A. Yes, sir.
Q. What are you doing now?
A. Working for Anhauser & Busch at the same place; watchman at the ice-house.
Q. How long have you been working for them?
A. Been working for them for a year; since they got it from the bank.

Mr. BELL: They got the property from the German bank?
A. Yes, sir.

Mr. MYERS: You have been working down there for the last year the last twelve months?
97 A. Worked there all the time ever since I was in St. Louis. Twelve years I have been there.
Q. Can you tell the jury how deep that mud is?

Mr. BELL: Now?
Mr. MYERS: Yes.

Mr. BELL: I object to the inquiry, as incompetent and irrelevant.

(Objection overruled, and defendant duly excepted.)

A. That mud is about twenty-two feet deep; I stuck down a 22-foot pole before it ever struck the rock bottom.
Q. When was that?
A. Last week.
Q. How near the dyke was that?
A. That was about 20 or 30 feet from the dyke.
Q. This way?
A. Yes; this way; Mr. Bush had me measure to see if he could get a raft.
Q. At whose request did you measure?
A. Mr. Bush.
Q. You were working for a man by the name of Bush?
A. Yes, sir; Anhauser & Bush.
Q. And your name is Bush?
A. Yes, sir; he had me to measure it.

Q. How deep has that mud been straight along since the dyke was built?

A. It has been from fifteen to twenty feet.

Q. You say you made the measurement about twenty feet north of the dyke?

A. Yes, sir.

Q. How far out from the bluff bank was that that you made that measurement?

A. About eighty or ninety feet from the bluff bank.

Q. Was that mud hard or soft?

A. Oh, it was soft; can't stand on it?

Q. How could logs be handled in that mud?

(Objected to by defendant, as incompetent and irrelevant.)

The COURT: What was your business when you were connected with the mill?

A. I worked there.

Q. Helped them get logs out?

A. Yes, sir.

The COURT: He may answer.

(Defendant duly excepted.)

Q. Did you ever have anything to do with handling logs?

A. I handled logs down there.

Q. I worked on the river; carried the line down and Charley Thorp was the hook driver.

Q. What was your business?

A. Carried the line down and followed the logs up and took it down again.

Q. Your business was helping get logs out?

A. Yes, sir.

98 Q. How many years were you doing that?

A. It was there for eleven years.

Q. Now, how could logs be handled in the mud since the dyke was built?

(Defendant objects to the question as incompetent and irrelevant, and the objection being overruled, defendant excepted.)

A. They can't be handled now without a man gets drowned in the mud.

Q. Do you know whether or not there were logs there while the dyke was being built?

A. Yes.

Q. Do you know about how long the city was at work from the time it first commenced until it quit work on the dyke?

A. No, sir; I don't know how long they were working at it; I saw the barge every day and talked with the men every day; I don't know how long.

Q. Several months?

A. Yes, sir; three or four months—maybe longer.

Q. Commencing in the winter?

A. No, sir; didn't commence in the winter, I don't think.

Q. In the spring?

A. Along in the spring, I think; I don't recollect.

Q. What became of the logs that were there when they began to build the dyke—while they were building it?

A. Heap of them in the mud now.

Q. What became of the others?

A. Some of them floated over in high water and got below the dyke; we tied up three or four below there and we got them out 3 or four days afterwards with the mules on the dyke.

Q. Did you get out all that floated off?

A. No, sir; we couldn't get them.

Q. Were you there every day during that time?

A. Every day, sir; I came there every day, rain or shine; didn't stop only Sundays.

Q. Have you any opinion or not about as to how many were lost in the mud and carried away?

A. No, sir, I can't tell you; I don't know how many were lost and carried away, but I know a good many logs were lost—left in the mud. This last year you could see the bark off of them standing up until the mud got all over them.

Cross-examination:

Q. Who ran the saw-mill when you first went to work there?

99 A. Mr. Myers & Vohlkamp.

Q. You were not working there in Ludlow's time?

A. No, sir.

Q. I forgot to ask you were the logs taken in this front way from the southern end of the raft?

A. No, sir.

Q. Or from the northern end, or how?

A. It was taken from——

Q. Side?

A. Taken some from the side and some from the end.

Q. Did the rafts of logs that the plaintiffs had there extend north of it in the water?

A. Bryan street?

Q. Yes, sir.

A. It extended up from Bryan street.

Q. From Bryan street up to the arsenal ground?

A. Yes, sir.

Q. About how far is that?

A. I don't know; about seven or eight hundred feet I reckon; may be more.

Q. About a thousand?

A. May be more; I don't know; it is three (3) blocks.

Q. You stated there wasn't any more done on the dyke in the winter. Now, aint you mistaken about that? Didn't they commence hauling with wagons to the dyke along in December, 1873?

A. I don't know what time; it was in the winter or spring. I know they hauled, but I don't think the barge came until spring.

Q. Didn't they haul with wagons during the winter?

A. They hauled for a time over the railroad; I didn't know what they were making then.

Q. Do you know now?

A. I know now, because I see.

Q. Why did you say, then, that they didn't commence working until spring?

A. I say I think it was in the spring.

Q. Isn't it a fact that they were hauling with teams in the winter?

A. They said they were going to make a street there.

Q. I don't care about that. Don't you know now that they were going to make this dyke?

A. I never thought what they were making; I just saw they were putting them against the bank

Q. Wasn't that part of the dyke?

A. Against the bank isn't part of the dyke. This was against the railroad bank.

Q. Were they railroad teams?

A. No, no; they belonged to John Lourig and Maurice Lourig.

100 *John Q. Myers' Testimony.*

Plaintiff called JOHN Q. MYERS, who, being duly sworn, testified as follows:

Q. You are the plaintiff?

A. Yes, sir.

Q. What is your age?

A. Fifty.

Q. How long have you lived in the city?

A. Thirty-nine years.

Q. Were you one of the firm of Myers & Vahlkamp?

A. Yes, sir.

Q. Who composed that firm?

A. John Q. Myers and Henry F. Vahlkamp.

Q. When did Vahlkamp die?

A. On the last day of January, 1873; 31st day of January, 1873, I think.

Q. You owned that property after his death, did you?

A. Yes, sir.

Q. Carried on that saw-mill?

A. Yes, sir.

Q. Up until some time after the building of the dike?

A. Yes, sir.

Q. Do you remember when the city commenced work on the dike?

A. No, sir; I do not; but I will state to the jury that during the winter months of October, November, and December, 1873, and January, 1874, I was not out of my room; I was at home confined to my bed, sick.

Q. So, if they worked in those months, you don't know?

A. I don't know; I was told afterward they did.

Q. Then, when you went to the mill after January, 1874, had any work been done that you remember?

A. I saw them; I didn't go down; I was too weak to walk about much on the river bank, being very cold weather. I saw the teams throwing rock over the bank.

Mr. BELL: When?

WITNESS: Either January or February, '74.

Mr. MYERS: How long did they continue working at it?

A. I can't tell. I went away to Minnesota about that time, and stayed in Minnesota two months to get my logs for the season.

Q. And returned when?

A. About April, I presume; about that time.

Q. How do you know when they quit working on the dike; did they work on it after your return?

A. They commenced throwing rock in the river afterwards.

Q. Out of barges?

A. Out of barges; yes.

Q. And kept at that how long?

A. Kept at that some two or three months.

101 Q. Then quit? Have they done anything since at it that you know?

A. No, sir; nothing; stopped half finished.

Q. Mr. Bell would like to know if you can state in what month they quit working, if you remember?

A. I couldn't tell. I paid no attention to it, supposing they would go on with it. In the summer months of 1874—July or August, or possibly even September; I couldn't recollect.

Q. You acquired the lease under the proceedings in the probate court?

A. Yes. In fact it is always mine.

Q. But the title was in Myers & Vahlkamp?

A. Yes, but Vahlkamp never owned a nickel of it.

Q. Now, when Myers & Vahlkamp first acquired that lease, the mill was there, was it?

A. Yes, it was.

Q. Who erected it?

A. Messrs. Ludlow and Co.—N. M. and F. M. Ludlow.

Q. F. M. Ludlow was the witness yesterday?

A. Yes; H. M. was his father.

COUNSEL: I thought it was his brother?

A. No, sir.

Q. Did you make no addition to the mill, your firm, after you acquired it?

A. Yes, sir.

Q. State what they were?

A. I put in entire new machinery complete.

Q. What else, if anything?

A. Two years after I found that there was difficulty in getting water from the city; I couldn't get water. Our mill-pond was con-

demned by the city, and I built a large cistern with pipes and pumps sunk in the ground. Originally I put the pump outside on the river front, and that was washed away by the first high water. I then built a small house sunk in the ground, put a Cameron pump in that, and pumped the water out of the river, and then had a force pump to force it into this cistern, a distance of some six hundred feet from the river, and there it would settle and flow back into the boilers, so I was plentifully supplied with water, and had hose all round the mill, so that in case of fire all I had to do was to attach it to the pump, and I could put out any fire.
102 The mill has been on fire twenty times, and I could always put it out; could keep throwing on water as long as there was a drop in the river.

Q. At what expense did you put in those improvements?

A. The cistern and boilers cost me about six thousand dollars, and the other improvements about five thousand, being eleven thousand in all.

Q. Were there any other improvements you put there?

A. No, sir, nothing, except what was absolutely necessary for repairing, &c.

Q. Do you remember how high that bank was just at that point?

A. The bluff bank?

Q. Yes.

A. About twenty-five (25) feet.

Q. Nearly perpendicular?

A. Yes, sir.

Q. What was the nature of the bed of the river?

A. It was solid rock.

Q. The channel was where prior to the dyke being built?

A. Always on the Missouri side.

Q. How did you get the logs out of the river?

A. By cutting them loose from the raft, driving a spike into them, and hitching a rope on them, and hauling them up by the bull-wheel, up to the mill on this incline plane under this culvert under the railroad track.

Q. With respect to the facility and economy with which logs could be hauled at that point, how did that site compare with others about the city?

A. That was the only reason that made it a valuable site, the room that I had, the river front that I had, the places to bank my logs, and the easy facility of hauling them out, saved an immense expense which other mills had to pay at all times, but I had no need to do it.

Q. Well, what was the result produced by the dyke?

A. The formation of a large amount of sediment naturally; it was a natural consequence.

Q. Extending from the bluff bank how far out?

A. At the present time?

Q. Well, from that time down.

The COURT: To the time you ceased to operate your mill.

103 WITNESS: Well, in some places it extended to the extreme end of the dyke.

Q. That is right alongside of the dyke?

A. Yes, sir.

Q. And shelving in towards the shore?

A. Naturally that would be a natural consequence, approaching to the point diagonal shaped.

Q. Forming a triangle?

A. Yes, sir.

Q. Soft or hard?

A. Soft, as a matter of course. It would take years to harden it.

Q. How deep was it?

A. When?

Q. Well, at any time.

A. I suppose it is twenty feet deep. It was last Sunday, I should judge.

Q. You were there yourself?

A. I was there last Sunday.

Q. With what facility and economy could logs be handled at that point after the building of the dyke?

A. Couldn't be handled at all, or I would never have given it up.

Q. How did you come to carry it on, and how long did you carry it on after the dyke was built?

A. About a year.

Q. How did you come to carry it on during that time?

WITNESS: How? I don't understand.

Q. Why?

A. Why, because I had the stock on hand. I had to saw it up.

Q. When had your contracts been made for logs?

(Objected to by defendant, as incompetent and irrelevant, and objection overruled, and defendant excepts.)

A. They were purchased naturally, the fall before—fall of 1873—up in Minnesota, and some in Wisconsin.

Q. And you endeavored to work them up—to work up those logs?

A. Yes, sir; all I could save out of the ruin I did work up; I had a year's stock there.

Q. When did they come down the river?

A. In May, June, July, and August, 1874.

Q. Were there any logs there at the time they commenced the building of the dyke, say November and December, 1873?

A. Oh, I have no doubt there were; there was always logs on the bank.

Q. You were not there?

A. No, sir; but I know we always kept them there. Good
104 safe place to keep them, and without we wanted them we didn't pull them out.

Q. Were there any logs there during the spring of 1874, while the dike was being built?

A. Well, all this fresh stock of logs came in that spring.

Q. Do you remember what month?

A. I told you May, June, July, and August.

Q. In anything like equal quantities?

A. Yes, sir; we aim to get them in equal quantities; about a million feet at a time; about one barge raft of logs.

Q. Commencing at the beginning or end of May on ——?

A. About the latter part of May, I presume they arrived—the pine logs.

Q. They began to arrive then?

A. About the latter part of May; I tried to keep them two weeks apart, so we could land them properly and take care of them.

Q. Do you know whether or not any of them were lost in the deposit of mud?

A. They were the lot that was lost; that was out of that lot.

Q. Were you at the mill attending to business from the end of May on?

A. I staid there every day, sir, from four o'clock in the morning.

Q. Can you approximate the amount of logs that was lost in that deposit?

(Objected to by defendant, as incompetent and irrelevant.)

The COURT: If the witness can state the amount with any certainty, he may state.

(Defendant excepts.)

A. Well, I had about a million and a half feet of logs when I sent for my attorney, Mr. Litton, and he came down and I told him, (obj. to): I wanted to get at the logs. I consider there was a million and a half lost, and he told me I had to take them out.

(Objected to.)

The COURT: It is a very simple question about the number of logs that were lost.

Well, I suppose there was at least a half million feet lost anyhow to put it down at the lowest figures.

Mr. BELL: Half a million of feet or half a million of logs in number?

A. Half a million of feet. We never had a million logs there.

105 Q. What was the then value of a half a million feet in this city?

A. Well, sixteen dollars a thousand.

Q. Lying as they lay there?

A. They cash me from sixteen to seventeen dollars a thousand feet; that would be sixteen or seventeen thousand dollars for a million feet. I am speaking of feet all the time.

Q. That would be $16,000 to $17,000 for a million feet, and you say at least half a million were lost?

A. At least half a million feet were lost.

Q. Lost by being sunk in the mud and carried away?

A. Carried away or sunk in the mud. Disappeared. The river

would rise in the night time, and, when I came down in the morning, bunches had disappeared and floated down in the river—I couldn't tell, the river rising and covering these logs.

Q. What means did you employ to rescue these logs?

A. Every means I could think of. I consulted with every man in the city that I could get advice from. I planked over the mud on the shore for from six to seven hundred feet with 50 to 60-foot flooring; had men to work at them, but they couldn't work in the river, and that failed. I used every means I could and spent more money than the logs were worth—the whole lot.

Q. How near to the bluff bank did the water flow before the building of that dyke?

A. It is depending on the stage of the river altogether.

Q. Well, on the average?

A. Oh, twenty or thirty feet.

Q. In high water how was it?

A. Come right up within three or four feet of the Iron Mountain railroad track, three or four feet probably.

Q. Where was the channel thrown by the building of that dyke?

A. Thrown on the other side of the river—the other side of the island, rather.

Q. How deep was the water just outside of the shore line that was left after the building of the dyke—the line that was created after the building of the dyke?

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A. Well, that varied because when the city is deserted the dyke there was a portion of it not as high near the centre as it was on each end and where the water would naturally rush through and it would wash the mud away; but at both extreme ends there was more or less sediment—sand-bars they called them—being formed.

Q. Well, has the condition of things improved or got worse from the time of the building of the dyke down to the present?

(Objected to by defendant, as incompetent and irrelevant. Objection overruled, and defendant excepted.)

A. I don't know what you mean, sir, by the question.

Q. I mean the condition of things for the purpose of carrying on the saw-mill business.

A. It has got worse, of course, as a natural consequence; every time the river rises there is more sediment; that is two or three times a year. It will go on, of course, until the sediment is on a level with the dyke, as a matter of course. That is what it was built for.

Q. What was the nature of the current at that point before the dyke was built?

A. Well, it was a very nice easy current for the Mississippi river.

Q. Strong current?

A. Strong, fair, and steady; not as apt to change as it was in the upper part of the city.

Q. What sort of current is there since the dyke was built?

A. Well, there has been no current at all.

Q. Sluggish?

A. Sluggish, dead water.

Q. Do you know the depth of the water at the extremity of the dyke in an average stage of river?

A. No, sir.

Q. Say at the eastern edge of this deposit sediment, do you know the depth of the water at the average stage of the river?

A. I suppose about fifteen feet (15).

Q. The depth of water at the present water line?

A. I suppose about two (2) inches.

107 COUNSEL: That is what I mean.

WITNESS: Of course as it rises it goes over this bank of mud slowly.

Q. And gradually deepens as it goes out?

A. Undoubtedly.

Q. Now, what use could one make of the river at that point for the purpose of carrying on the saw-mill business since the building of that dike?

A. Oh, couldn't do it at all; it would be a moral impossibility—an impossibility, anyhow.

Q. Mr. MEYERS: What, in your judgment, was the value of that leasehold term just before the building of that dike?

A. I was offered fifty thousand dollars for it: I wanted to sell it; I wanted to quit the business, but I refused to take it; I offered to take sixty thousand (60), if the man would give me security.

Mr. BELL: I object to what you were offered.

THE COURT: You needn't state what you were offered.

Mr. MYERS: What, in your judgment, was it worth?

A. Sixty thousand dollars, what I asked for it.

(Objected to by defendant, as incompetent and irrelevant.)

THE COURT: He has answered the question.

Q. What, in your judgment, was it worth immediately after the building of the dyke?

(Objected to by defendant as incompetent and irrelevant. Objection overruled, and defendant duly excepted.)

A. It wasn't worth a cent.

Q. Do you know what the taxes were on that property per annum?

A. Something like two hundred and fifty to three hundred a year I should think.

Cross-examination:

Q. Mr. MYERS: When did you first become connected with this saw-mill?

A. In 1861, sir.

Q. Who was running it at that time?

A. Ludlow & Co.

Q. What was your first connection with it?

A. Clerk; superintendent I was really, but they called me clerk; superintendent of the mill.

Q. How long did you continue in that capacity?

A. I think two years and a half, sir; about that.

108 Q. You had no other interest except that of clerk or superintendent during that time?

A. No, sir.

Q. No interest in the business?

A. No.

Q. Had no money in the firm?

A. Mr. Ludlow owed me some money individually.

Q. For what?

A. Individually loaned, sir.

Q. Money loaned on services?

A. Money loaned.

Q. What salary did you receive?

A. A hundred dollars a month, I think.

Q. Who was this Nathaniel Myers that had a mortgage on this property?

A. My brother.

Q. Had he loaned money there?

A. Yes, sir.

Q. And you had loaned money there also?

A. No, sir; he loaned money on a deed of trust; I loaned money personally.

Q. You had no security for yours?

A. No, sir.

Q. But he had security for his?

A. Yes, sir.

Q. The property was sold out under his deed of trust?

A. Yes, sir.

Q. And bought in by Westlake?

A. Yes, sir.

Q. And that controversy that has been read in evidence here from the Ludlows to Walker was a conveyance under the deed of trust?

A. I presume so. It was got up by my attorneys; I don't know.

Q. There was a sale of this property at the court-house door, was there not?

A. No, sir.

Q. At the premises?

A. Yes, sir.

Q. And the property was bought in by Westlake?

A. Yes, sir.

Q. Now, where is that deed?

WITNESS: The conveyance to Westlake?

COUNSEL: Yes, sir.

A. It is on record; I dont know where it is; I don't know that it is in existence.

Q. Don't you remember that it was here at the last trial of this case; that it was read in evidence?

A. My attorneys have it if it is here.

Q. Have you got it?

A. I haven't got none of the papers.
Q. Your attorneys have it?
A. Yes, sir.
Q. Have you had it since the last trial?
A. No, sir.
Q. Why did Westlake bid in this property?

(Obj. to by plaintiff.)

The COURT: What do you want to show?

Mr. BELL: I want to trace up Mr. Myers' connection with this
109 property and the manner in which he acquired it, and I propose to call upon the gentlemen on the other side to produce these deeds for the purpose of reading them in evidence as a part of my case. Mr. Myers alleges that he has been damaged on the leasehold sixty thousand dollars and on his saw logs eight thousand; that is, $68,000. That is his estimate, and I want to test the accuracy of that estimate and show that this property cost Mr. Myers what his actual outlay was, and how he acquired it. I want to go into the whole matter with a view of getting at his actual damages, and showing that his estimate is an exaggerated one.

(The objection was sustained, and defendant duly excepted.)

Q. After Westlake bought it in he conveyed the property to you?
A. Yes, sir.
Q. Personally or to your partner?

The COURT: If it is in writing it will have to explain itself.

Q. Was Mr. Westlake in your employ, Mr. Myers?
A. No, sir.
Q. What connection had he with your property?

The COURT: That question may be answered.

A. He acted as a mutual friend between Ludlow and myself.
Q. Why was it considered necessary that Westlake should take the title?

(Objected to by plaintiff, and objection sustained, and defendant duly excepted.)

Q. Did Westlake pay any money?

(Objected to by plaintiff.)

Mr. BELL: The deed specifies that he paid 12,000 dollars. I propose to show that he did not.

(Objection sustained, and defendant duly excepted.)

Q. What amount of money did he pay?

(Objected to by plaintiff; objection sustained, and defendant duly excepted.)

Q. What was the amount due on that deed of trust to Nathaniel Myers under which the sale was had?

(Objected to by plaintiff; objection sustained. To all of which above rulings of the court the defendant then and there
110 duly excepted.)

Q. How much did you pay at the time you acquired the property from Westlake under the deed to them in evidence?

A. I paid twenty-five thousand dollars for the mill.

Q. Mr. Myers, who did you pay it to?

A. To Messrs. Ludlow & Co., less the deed of trust which I assumed.

Mr. BELL: What did you pay it in—cash or check, or how?

A. I forget, sir, exactly, because, to answer that, would take me about three minutes.

COUNSEL: Well, take three minutes.

A. I paid when I first purchased it.

The COURT: You are speaking now of the firm of Myers & Vahlkamp?

A. Yes, sir; we purchased from Westlake, and the money was paid Messrs. Ludlow & Co., and I assumed a deed of trust and paid off the second deed of trust due Nat. Myers of four thousand and some odd hundred dollars in cash; I then gave him during the next year—1864—$3,100, and in 1865 I gave him 9,700 dollars; as near as I can recollect, 9,600 or 9,000 and some odd hundred, making in all twenty-five thousand for that mill.

Q. Then, in that deed, dated December 22nd, 1863, from Westlake to John Q. Myers and Henry F. Vahlkamp, why is it stated that the consideration is twelve thousand five hundred dollars?

A. Because that was all the consideration at that time; I have the papers at home; I haven't got them here, I don't think, without my attorneys have them; the original private agreement was made by Meesrs. Sharp and Broadhead, and written by Herman Haenussler, who was then a student in this office, and signed by Ludlow and myself; by that agreement he still had, and still held, one-half interest in the mill privately, but publibly he held nothing, trusting my integrity for his pay.

Q. That was done for the purpose of concealing the property from Ludlow's creditors, was it not?

A. No, sir, it was not; I assumed the debt; I paid all his debts.

111 Q. Will you explain to the jury why it was that in the deed from Westlake to Myers & Vahlkamp, dated December 22nd, 1836, $12,500, instead of $25,000, which you say you paid?

A. I didn't pay that sum. I told you I assumed the deed of trust of Emory S. Wood for $5,000, and paid my brother's claim, of $4,000 dollars, that's $9,000. Then I paid $2,500 cash, and certain debts that the mill owed which brought it up to $12,500. That was in 1863. In 1864, I paid to N. M. Ludlow, the son, the witness who was on the stand here, he was in Montana, and I paid to the father on his account, & $3,100 on his return in the spring of 1865; I bought the other half, you understand, the honorable half than I owed.

Q. What other half?

A. I bought the entire mill in my name, still allowing him according to private agreement to one-half.

Q. Don't the deed of December, 1863, purport to convey the entire property to Myers & Vahlkamp?

A. It did; yes, sir.

Q. Then what other half were you talking about?

A. Because it was an honorable transaction between him and myself.

Q. You mean to say that whatever the understanding was in this conveyance, the deed would legally represent it?

A. Yes, sir.

Q. But honorably it did not?

A. No, sir; because I was to pay him for his interest, which I did.

Q. Where is the evidence in writing that you were to pay him that?

A. I haven't got the paper with me now, and I pledge upon my honor you will have it in the morning.

Q. What paper was that?

A. A paper drawn up by Sharp and Broadhead. Mr. Sharp acting for Mr. Ludlow, and Mr. Broadhead acting for me, and Mr. Hauessler did the writing.

Q. Sharp & Broadhead being partners in the practice of law, and one of them acting for you and the other for Mr. Ludlow?

A. Yes sir.

Q. And the clerk acting for both of you?

A. No; he done the writing.

112 Q. He took the acknowledgment?

A. Yes sir.

Q. That was a secret agreement between you and Ludlow?

A. No, sir.

Q. This deed was put on record, was it not?

A. Yes, sir.

Q. The secret agreement between you and Ludlow was not recorded?

WITNESS: Let me answer whether it was recorded; I will tell you why it was not recorded.

Q. I want you to tell me whether it was recorded?

A. The private agreement?

Q. Yes.

A. I don't know; let me tell you why; I had nothing to do with it; my attorney attended to that business—Mr. Sharp.

Q. And you acted under Mr. Sharp's advice?

A. Undoubtedly.

Q. Did you give your notes for the deferred payments?

A. No, sir.

Q. How were those payments represented?

A. By my simple word.

Q. There was no negotiable paper outstanding for that?

A. There was a written agreement between Mr. Ludlow and myself.

Q. That is the secret agreement?

A. It can't be secret when it was in writing.

Q. It was a secret from all the world, wasn't it?

A. My attorneys knew it, and his attorneys knew it.

Q. But the balance of mankind didn't know anything about it?

A. I didn't ask them that; one of the attorneys didn't know me then.

Q. Was there any other evidence except this secret agreement?

A. Yes; I will state the reason; at that time Mr. Ludlow was my employer.

Q. State whether there was any other paper?

The COURT: Was there any other agreement that Wm. Haeussler drew up?

A. Yes, sir; two or three in connection with this.

Mr. BELL: Other agreements?

A. Yes, sir; in connection with it.

Q. What was those other agreements; were they in writing?

A. Yes, sir; all in writing.

Q. All drawn by Mr. Sharp?

A, Yes, sir; all drawn by the same parties. The agreement was this: My employer at that time, Mr. Ludlow, got into a little trouble about some property that he held up in the country, what it
113 *was* I really don't know, but he finally concluded to sell out to me; I had six or seven thousand dollars of my own money, and he sold out to me the whole lock, stock and barrel, for $12,500, which I paid, with the private understanding that if he came back in two years, or within two years, I was to return the mill in as good order as I received it, the machinery and appurtenances, and everything except the stock of logs, stock on hand, that had to be valued; if he came back in two years I had to return it to him just as I received it; that was also in writing; he came back at the end of two years, but instead of taking possession he concluded he would sell me the other half, as he thought he could make more money out in the mountains, or in Montana; I forget where he went to, but somewhere in that neighborhood; so I paid him the other half like a good little man, in cash.

Q. What other half?

A. What I agreed to pay.

Q. But this deed says he conveys to you the whole?

A. Yes, I had it all, but I didn't swindle him out of it; I paid him for the other half; didn't swindle him out of the other half, not by a long ways.

Q. I understand you didn't buy the property in 1863, but took possession with the understanding that if Mr. Ludlow came back in two years you would give it all back?

A. Yes; all back.

Q. You hadn't bought it?

A. I had; I bought it from Mr. Westlake, the whole of it.

Q. Where does that other half come from; how came you to pay for another half in 1865?

A. I just made him a present of it.
Q. You made him a present?
A. That was the private agreement.

(Objected to by plaintiff.)

(Objection sustained, and defendant duly excepted.)

Q. How much did Vahlkamp furnish?
A. Nothing at all; not a nickel.
Q. How long did you remain in partnership with Vahlkamp?
114 A. From 1863 to the day of his death.
Q. When was that?
A. In 1873.
Q. Equal partners?
A. No, sir.
Q. How were you partners?

(Objected to by plaintiff, as immaterial, and objection sustained, and defendant duly excepted.)

Q. How much did Vahlkamp's interest amount to upon his death?

(Objected to by plaintiff, and objection sustained, and defendant duly excepted.)

Q. Isn't it a fact, Mr. Myers, that you settled up the partnership estate in the probate court?
A. Yes, sir.
Q. And isn't it also a fact that the Vahlkamp estate got no money out of this mill property?
A. No, sir.
Q. How much did it get?

(Objected by plaintiff, as immaterial, and objection sustained, and defendant duly excepted.)

Q. You say they did get some?
A. Yes, sir.
Q. After Vahlkamp's death you claimed his interest in the property by virtue of conveyance made you by the clerk of the probate court?
A. I presume so; my lawyer told me so; I don't know; I knew nothing about it; my lawyers done it all; I don't know.
Q. Now, isn't it a fact that the property was conveyed to you by the clerk of the probate court without any money being paid by you to the representatives of the Vahlkamp estate?
A. I paid considerable at that time.
Q. What I want to get at is this: Isn't it a fact that you paid or assumed a payment of the partnership debts of the firm of Myers & Vahlkamp to such an extent as represented the amount you were to pay for this property under the conveyance from the probate court? Wasn't it settled in that way, by your paying or assuming to pay the debts of the old firm to that amount; that is, to the amount of Vahlkamp's interest in this leasehold?

WITNESS: When was that deeded?

COUNSEL: The date of that is the 20th of July; it is acknowledged July the 20th, 1875.

115 WITNESS: Oh, I had paid her considerable money then.

COUNSEL: Eh?

A. I had paid the family, the representatives of Vahlkamp, at that time considerable money.

Q. Now, isn't it a fact, Mr. Meyers, that you acquired the property under this proceeding, all the property being appraised at thirty-five thousand dollars, by charging yourself with that money—amount of money that that charge was balanced on your account of the firm debts and obligations which were paid by you? Isn't that true, sir?

A. I paid considerable more, sir.

Q. Well, that, of course, springs from your gratitude; but I want to know whether that is a fact.

A. I don't really understand what you want to get at. Of course, I done what they told me.

Q. This is the point: When Vahlkamp died the firm estate was passed to probate; this leasehold, buildings, mills, personal property, mill, wagons, lumber, and everything of that sort, as assuming partner you administered on the firm assets, there was an appraisement of the firm assets, and they were appraised at 3,500 dollars, and you became the purchaser, so that after the death of Vahlkamp you were the sole owner of the old firm property, assets, etc., at the appraised value of 3,500 dollars. Now, of that appraised value as a partner owned your interest, and Vahlkamp, as your partner, owned his interest—what I want to get at is this: Isn't it true that in the settlement of the partnership of Meyers & Vahlkamp, Mr. Vahlkamp's interest in these assets appraised at 3,500 dollars was entirely exhausted and balanced by the firm debts, which you, as surviving partner, paid?

A. No, sir.

Q. How much were the partnership debts?

(Objected to by plaintiff, and objection sustained, and defendant duly excepted.)

Q. Mr. Meyers, the saw-mill itself was erected on these prem-
116 ises and used prior to the first day of January, 1870, was it not?

A. Yes, sir.

Q. Some time before that?

A. Ten years before, sir.

Q. The firm of Myers & Vahlkamp did not put up the saw-mill?

A. No, sir.

Q. They didn't put in this way and tunnel by which you handled these logs up?

A. No, sir.

Q. The machinery in the saw-mill was put in by——

A. No, sir; I put in new machinery.

Mr. BELL: You don't wait. I say the stock and machinery and appliances the firm of Myers & Vahlkamp subsequently added some—substituted new for old machinery, etc.

WITNESS: You will have to excuse me; I am somewhat of a fast man in speaking. I bought the mill of Messrs. Ludlow and Co., in 1863, in good running order, but it wasn't powerful enough to suit my ideas of the business, and I took that machinery out and put in more powerful machinery at an expense of some six thousand odd hundred dollars.

Q. That was more to suit your peculiar notions about the saw-mill business than to meet any necessity of the case?

A. No, sir; it wasn't done to suit my peculiar notions, but to furnish what the mill needed for the amount of business the mill could do.

Q. Isn't it a fact that you had rather elevated notions about the saw-mill and about the machinery; in other words, that you conducted your business a little more extravagantly than the other mills were conducted in St. Louis?

A. No, sir; it was run cheaper than any other mill in St. Louis.

Q. You never hesitated at any outlay for machinery and improvements or anything of that sort?

A. None when it was required, and when I thought it was going to be profitable.

Q. You were not inclined to be economical in that regard?

A. Not where I thought it was necessary or profitable. If I thought I could make six thousand dollars by expending
117 five thousand I did it.

Q. It went without a thought?

A. Yes, I thought of it; when I spent it I thought of it.

Q. How much space in the Mississippi river did you occupy with your logs and rafts?

WITNESS: That depends, Mr. Bell; you will have to qualify that, as I don't wish to answer incorrectly; you will have to ask the question what time of the year it was and about what my stock was.

Mr. BELL: You can answer that by explaining the matter to the jury.

WITNESS: Well, gentlemen, sometimes I did not have an inch, sometimes my logs were all out of the river, and sometimes I would use not less than sixteen hundred feet. It depends when my stock came in the spring. I split my rafts for safety, so that—would not project out into the river. I would like to explain to the jury the size of a raft.

Mr. BELL: Go on.

WITNESS: I would like to explain to you, gentlemen, the size of a raft—a pine raft—being 320 feet long, by as wide as they choose to make it. The average raft would be probably 150 feet wide. Now, if that was the only raft I had in the river, I would split it in two, making two halves, and leaving a little portion of one-half below, so that the water wouldn't affect it so much. If I had two rafts I would let them be as they were—you understand—pulled out; and

if a third one came up I would land it way up at the arsenal, right on the arsenal grounds. I had permission from the Government officers to do that, so it extended all the way from an inch, I may say, up to fifteen hundred feet.

Q. Then it is a fact, Mr. Myers, that the amount of 162 feet, which you were entitled to under the lease read in evidence here, did not constitute the entire space in the river occupied by you with your logs?

A. Oh, I could have occupied the river from St. Louis to St.
118 Paul, and claimed it; I should have claimed it from St. Louis to St. Paul if my logs demanded it.

Q. How much did you occupy?

A. I say sometimes not an inch, and other times two hundred, 250, 500, 1,000—all the way up to fifteen hundred feet. Just as my logs demanded space.

Q. Just as your necessities required, so you extended the occupation of the river?

A. Provided I did not interfere with anybody else.

Q. When you had a million feet of logs how much space did you occupy?

A. That depends on the conditions. If I left it in one raft, 320 feet the entire length, you understand.

COUNSEL: But suppose you didn't have it in one raft; how much space did you occupy?

A. Well, I don't know; I could split it up in twelve pieces if I choose. I could make it 33,600 feet long.

Q. Did you ever do that?

A. No, sir.

Q. How much did you occupy?

A. At the most from the arsenal grounds property down to the mill, because steamboats landed below and above.

Q. In the fall of 187- you went to Wisconsin and Minnesota and made your contracts?

A. No, sir; I done that by letter—by mail. I was sick in bed.

Q. How much lumber did you buy?

[A.] Didn't buy any lumber at all.

Q. I mean logs?

A. Oh, yes; I bought about three million feet—my usual quantity.

Q. Did you pay for it?

(Objected to by plaintiff; objection sustained, and defendant duly excepted.)

Q. You bought three million feet; when did the- commence arriving?

A. About the middle or latter part of May, 1874.

Q. When did they stop arriving?

A. I presume in August; I didn't keep account exactly.

Q. Your mill was running continually up to that time?

A. Well, I can't recollect exactly the date, but about the middle of July, 1875.

Q. About July 15th, 1875?

A. About that.

Q. Did your mill run night and day?

A. It did during the spring and summer months. In the
119 winter it ran only in the day time.

Q. About half the year it ran day and night?

A. No, sir; two-thirds of the year and a little over in an average year.

Q. Did it run Sundays?

A. No, sir—no, sir.

Q. Two-thirds of the year it ran day and night except Sundays, and one-third of the year it ran only in the day time?

A. Yes, sir.

Q. What was the capacity of the mill?

A. Five million feet.

Q. A year?

A. Yes, sir.

Q. Running, of course, in this way?

A. No, sir—no, sir: full capacity.

Q. Well, ain't this full capacity?

A. No, sir.

Q. What is it: what part of the full capacity?

A. I don't know what you call it.

Q. Well, what portion of the year?

A. There was eight months of the year I ran full time, day and night, and four months I only ran half time.

Q. That is within one-sixth of the full capacity?

WITNESS: Oh, any thing about mills I can answer.

COUNSEL: Yes, I see you can. How much do you say your taxes were?

A. I don't know; I forget. Two or three hundred dollars; whatever they valued the property at.

Q. You are speaking of taxes for a series of years running back before you quit?

A. Oh, it was about the same; didn't vary much.

Q. Two or three hundred dollars?

A. Something like that. That was on the mill, not on the ground.

Q. Well, you paid the taxes on that ground?

A. That was separate.

Q. Do you mean to say there was a separate assessment?

A. Oh, yes.

Q. You paid the taxes?

A. Yes, sir.

Q. How much taxes on the mill did you used to pay?

A. That I can't tell you. Mr. Carpenter used to pay the taxes on the mill and I paid him back. Octavia Boyce's entire tract was all assessed at once.

Q. Assessed to Octavia Boyce or Myers & Vahlkamp?

A. Assessed to Octavia Boyce; Myers & Vahlkamp being the lessees. Carpenter used to pay the bills and I paid him back. I didn't trouble my head about Carpenter's business.

Mr. BELL: Of course not. That's all, Mr. Myers.

120 At this point the plaintiff rested.

Testimony for Defendant.

Defendant's counsel offers in evidence an act of the General Assembly of the State of Missouri, entitled "An act to incorporate the inhabitants of the town of St. Louis," approved December 9th, 1822, for the purpose of proving that the eastern boundary of the city of St. Louis was then established as in the middle of the main channel of the Mississippi river.

Act of General Assembly Incorporating the Inhabitants of the Town of St. Louis, App'd Dec. 9, 1822.

To incorporate the inhabitants of the town of St. Louis.

Be it enacted by the General Assembly of the State of Missouri, as follows:

1. That all the districts of country contained within the following limits, to wit: Beginning at a point in the main channel of the Mississippi river due east of the southern end of a bridge across mill pond at the lower end of the town of St. Louis, thence due west to point at which the western line of Seventh street extended southwardly will intersect the same; thence northwardly along the western side of Seventh street, and continuing in that course to a point due west of the northern side of Roy's tower; thence due east to the middle of the main channel of the river Mississippi; thence with the middle of the main channel of said river to the beginning, shall be, and is hereby, erected into the city by the name of the city of St. Louis, and the inhabitants thereof shall be, and are hereby, constituted a body politic and corporate by the name and style of "The Mayor, Alderman, and Citizens of the City of St. Louis," and by that name they and their successors shall be known in law, have perpetual succession, sue and be sued, implead and be im-
121 pleaded, defend and be defended in all the courts of law and equity, and in all actions and matters whatsoever; may grant, purchase, and receive and hold property, real and personal, within the said city, and no other (burial grounds excepted), and may lease, sell, and dispose of the same for the benefit of the city, and may do all other acts as natural persons, and may have a common seal, and break and alter the same at pleasure.

(Objected to by plaintiff. Objection sustained, and defendant duly excepted.)

Mr. BELL (for defendant): I now offer to read from an act of the General Assembly, entitled "An act to revise the charter of St. Louis, and to extend the limits thereof," approved March 4th, 1870, to prove that the eastern boundary of the city opposite the premises in question was in the middle of the main channel of the Mississippi river, and also that portion of the charter which authorizes the city to construct all needful improvements in the harbor, which shall

compose the bed of the Mississippi river, its channels, shores, bayous, and islands from the middle of the Mississippi river to the mouth of the Merrimac river, and control, guide, and deflect the currents of the river, and erect, repair, and regulate public wharfs and dikes.

Act to Revise the Charter of St. Louis, App'd March 4, 1870.

SEC. 2. The corporate limits of said city shall comprise all that district of country situated in the city of St. Louis, to wit: Beginning at a point in the middle of the main channel of the Mississippi river where the continuation of Keokuk street would intersect said main channel; thence westwardly by the said line of the south side of Keokuk street to a point six hundred and fifty feet west of Grand avenue; thence northwardly on a line parallel with Grand avenue, at a distance of six hundred and sixty feet there-
122 from until it intersects the Bellefontaine road; thence northeast to the line dividing townships forty-five and forty-six north, range seven east; thence eastwardly with the same line and in the same direction to the middle of the main channel of the Mississippi river; thence southwardly and with the meanderings of the main channel of said river to the place of beginning; and also the following district of country situate in St. Louis county, to wit: Beginning at a point in the middle of the main channel of the Mississippi river, where the continuation of Keokuk street eastwardly would intersect said main channel (being the same point of beginning as hereinbefore set forth); thence westwardly by the said line of the south side of Keokuk street to a point six hundred and sixty feet west of Grand avenue; thence southwardly in a straight line until said line intersects the northwestern corner of the boundary line of the city of Carondelet to the southwestern corner of the said city of Carondelet to the middle of the main channel of the Mississippi river; thence northwardly with the meanderings of said main channel to the place of beginning. The district of country first above described shall be known as "the old limits," and the last above described shall be known as the "new limits," and they shall be subject to all the provisions hereinafter provided for the government of and improvement in the said "old" and "new" limits, respectively. That part of the city defined and designated by an act entitled "An act to revise the city charter of St. Louis," approved March 13, 1867, as the old limits shall hereafter be known
123 as the first district; that part of the city therein defined as the new limits shall be known as the second district, and that part which is added to the city by this act shall be known and designated as the third district.

Portion of the Charter which Authorizes the City to construct all Needful Improvements.

Eight. To construct all needful improvements in the harbor, which shall comprise the bed of the Mississippi river, its channels, shores, bayous, bars, and islands from the mouth of the Missouri

river to the mouth of the Merrimac river; to control, guide, or deflect the currents of the river; to erect, repair, and regulate public wharfs and docks; to regulate marine railways; to regulate and license all ferries, to sell ferry privileges within the city limits, and to establish ferry rates, create the office of port wardens, and define their duties; to regulate the stationing, anchoring, and mooring of vessels in the city, to charge and collect wharfage and tonnage dues, wharfage on fire-wood, lumber, timber, logs, shingles, staves, posts, laths, and other articles brought to the port of St. Louis.

(Objected to by the plaintiff.)

The COURT: That will be excluded on the ground that it is a public act, of which the court takes judicial notice, and will instruct the jury.

To which ruling defendant duly excepts.

An Act about Swamp Lands in St. Louis County.

Mr. BELL: I now offer an act of the General Assembly of the State of Missouri, entitled "An act about swamp land in St. Louis county," approved March 3rd, 1857:

Be it enacted by the General Assembly of the State of Missouri, as follows:

SECTION 1. That all the right, title, interest, and claim of the State of Missouri acquired by virtue of an act of Congress entitled "An act to enable the State of Arkansas and other States to reclaim the swamp lands within their limits," approved September 28th, 1850, or otherwise, in and to those two certain islands in the Missis-
124 sippi river, in the county of St. Louis, the one called and known as Duncan's Island, situate, lying, and being opposite to the lower part of the city of St. Louis; the other called and known as Quarantine Island, lying below said city, and being the same now occupied and used by said city authorities for quarantine purposes, is hereby transferred and set over to said city of St. Louis.

SEC. 2. All lands owned by this State, not reserved for public purposes, within the limits within which the city of St. Louis is empowered by its charter to enforce quarantine laws, are hereby granted to said city, with power to receive and hold the same, and with all powers in reference thereto as said city now has over other property held by said city, anything in its charter to the contrary notwithstanding. This is to be in force from its passage.

Approved March 3rd, 1851.

(Objected to by plaintiff, as immaterial.)

The COURT: For what purpose is that offered?

Mr. BELL: That is offered to show a grant from the State to the city of St. Louis of the bed of the Mississippi river and the wharf which was subsequently opened.

The COURT: That will be excluded.

(Defendant duly excepted.)

Mr. BELL: I now offer section 9 of an act of Congress entitled "An act authorizing documentary evidence of title to be furnished to the owners of certain lands in the city of St. Louis," approved March 12th, 1866.

Section 9 of an Act of Congress Authorizing Documentary Evidence of Titles to be Furnished Owners of Certain Lands, etc.

SECTION 9. And be it further enacted that all of the rights, title, and interest of the United States in and to all of the wharves, streets, lanes, and avenues, alleys, and other public thoroughfares which are situate, lying, and being within the corporate limits of the city of St. Louis, and the State of Missouri, shall be, and the same are hereby, granted, relinquished, and conveyed by the United States in
125 fee-simple and in full property to the said city of St. Louis, and to the successors and assigns forever of said city; Provided, however, That no individual rights or titles acquired previously hereto shall be in any manner impaired or prejudiced hereby.

Approved June 12th, 1866.

The COURT: Any objection to that, Mr. Myers?

A. Yes, sir; we object to that.

The COURT: I don't think that is material.

Mr. BELL: I trust your honor won't exclude it on that ground.

The COURT: Yes.

Mr. BELL: I bow to the decision of the court.

The COURT: It is excluded.

(Defendant duly excepts.)

Mr. BELL: Now, in order to let these books go out of the room, I desire to offer the assessment of property against Myers & Vahlkamp for the years 1872, 1873, and 1874, being the property in controversy here. (To counsel.) Any objection?

Mr. SHEPLEY: Yes.

Frank M. Green's Testimony.

Defendant then called FRANK M. GREEN, who, being duly sworn, testified as follows:

Q. What is your business?

A. Clerk in the assessors' office.

Q. What is this book, marked assessment of 1872?

A. The assessment of the taxes of 1873.

Q. For the year 1872?

A. Assessment of 1872 taxes and 1873.

Q. State, county, and city taxes?

A. Yes, sir.

Q. Have you got the assessment there for that year against the firm of Myers & Vahlkamp?

A. Yes, sir.

Q. How much is it?

(Objected to, as incompetent.)

The COURT: I don't think the book is competent evidence as to the value of the property.

Mr. BELL: I offer to prove the assessment made for the years 1872, 1873, and 1874, for State, city, and county taxes against the firm of Myers & Vahlkamp.

The COURT: By the assessors' book?

Mr. BELL: Yes, sir.

The COURT: That will be excluded.

(Defendant duly excepted.)

126 Mr. BELL: Do I understand your honor that if the return can be found that will be admitted?

The COURT: That will certainly stand on a different footing from the book when that return is here. I will pass on that.

Mr. BELL: Well, it will involve some little labor in hunting it up. (To witness.) That is all; much obliged.

Mr. BELL: I now offer in evidence ordinance No. 5403, being an ordinance to establish and open a wharf from Biddle street to the northern boundary of the city, and from Hazel street to the southern boundary of the city.

(Objected to, as immaterial.)

Pending the discussion of which the court adjourned until Saturday, a. m., March 22nd.

ST. LOUIS, *March 22nd*, '79.

Court met pursuant to adjournment and case on trial progressed as follows:

Mr. BELL, for defendant. I desire to offer in evidence Ord. No. 5433, establishing the wharf line from Choteau avenue to the southern limits, approved August 6th, 1864. Also the condemnation proceedings under the city Ord. 540; also Ord. No. 6225, confirming the verdict of the jury in the matter of the opening of the wharf from Choteau avenue so far as to the southern limits of the city of St. Louis, approved July 2nd, 1867. It appeared from said ordinance and condemnation proceedings that the said proceedings and the compensation awarded thereunder to plaintiff related to a strip of land 300 feet wide, embraced within the lines of a proposed wharf, as indicated on a map offered in evidence by defendant and hereinafter inserted, purporting to have been sent to the Governor of Illinois on Nov. 10, 1874. The eastern boundary-line of said proposed wharf is coincident with the eastern end of the Bryan street dyke, and the western boundary line of the same was three hundred feet nearer the shore of the river.

(All of which was excluded by the court, and the defendant duly excepted.)

Mr. BELL: I now offer in evidence ordinance No. 3560, "An ordinance to improve the harbor opposite Bryan street," as follows:

An ordinance to improve the harbor opposite Bryan street.

Ordinance 8560, to Improve Harbor Opposite Bryan Street.

127 Be it ordained by the city council of the city of St. Louis:

SECT. 1. The city engineer is hereby authorized and directed to construct a stone spur dike eight feet above low-water mark, and connecting with the present high bank of the Mississippi river east of the Iron Mountain railroad, to connect the present high bank of the Mississippi river east of the Iron Mountain railroad with the east line of the wharf, as established by ordinance No. 5403, at the foot of Bryan street, in a linear continuation of the city line of said street.

SECT. 2. The sum of twenty-five hundred dollars is hereby set apart out of the harbor fund for the construction of said dike.

Approved July 11th, 1873.

Mr. BELL: I now offer contract 2940, between the city of St. Louis and Henry Doering, for the construction of that dike under the ordinance as follows:

Contract 2940 Between City of St. Louis and Henry Doering.

Agreement made and entered into, at St. Louis, Mo., this 13th day of August, 1873, by and between Henry Doering, as principal, and Francis P. Becker and F. W. Redecker, as sureties, parties of first part, and the "city of St. Louis," party of the second part, in manner following, to wit:

Whereas the city engineer of the said "city of St. Louis," under the provisions of ordinance No. 8560 especially, and by virtue of authority in him vested by the general ordinance of the city of St. Louis, did let unto the said Henry Doering the furnishing and delivery of all the rough stone that may be necessary for the construction of a stone spur dike eight feet above low water, at the foot of Bryan street, in linear continuation with the south line of said street, as may be particularly shown and specified by the city engineer: Now, therefore,

128 the said Henry Doering, for himself, his heirs, executors, and administrators, does hereby agree and bind himself to furnish and deliver all the rough stone that may be necessary for the construction of a stone dike, being a spur dyke eight feet above low water, at the foot of Bryan street, in linear continuation with the south line of said street, as shall be more distinctly and particularly specified by the city engineer or his assistants in charge of said work. The same to be done in accordance with the following specification, to wit: The stone shall be of the best quality, free from rubbish, spalls, and small stones, and shall be such as will not disintegrate by the action of the elements. The stone must be of medium size, and not larger than a man can handle with ease. The stone must be deposited from boats, placed so that it can be put accurately into the position required by the plan of the work, and the lines of the dike will be carefully marked out. The stone, when delivered, will be measured by ascertaining the weight of each boat load by a measurement of the displacement of the water, and each cubic foot of water so displaced will be taken at sixty-two and one-

half pounds, and the stones will be rated two thousand six hundred and fifty pounds per perch of twenty-five cubic feet. The dyke will be of such size and shape on each portion of the work as shall be deemed by the city engineer to require, not less, however, than three feet broad on top and eight feet above low water of 1863. Where the dike joins on to the shore the stone will be placed with care, so as to prevent the washing of the shore. The work will be limited to the amount of the present appropriation, ordinance No. 8560, unless it shall be otherwise ordered by the common council, and the work must be commenced within ten days after notification shall be
129 shall be given by the city engineer, and it shall be prosecuted with sufficient force and vigor to complete said dyke within six (6) months from the date of the approval hereof by the common council. If the contractor shall fail to prosecute the work as directed by the engineer, then the engineer may cause the same to be done at the expense of the said Henry Doering, and every part of the work shall be done under the direction and to the satisfaction of the engineer, who shall be sole umpire in all matters of dispute growing out of the agreement, and his decision shall be final and binding upon all parties hereto. Payments will be made from time to time as the work progresses, at the discretion of the engineer, not oftener, however, than once a month, and deducting ten per centum from the value of the work to secure completion, which said ten per centum shall be paid within thirty days from the date of completion of work. The engineer reserves the right to discharge from the work any or all persons who shall disobey his orders in relation thereto, or who may appear incompetent to discharge the duties devolving upon them; and should the said Henry Doering fail to carry out said work vigorously, or cause unnecessary delay or inconvenience to the public, the city engineer shall have the right to have so much of said work done at the said Henry Doering's expense as he may think the public interest of the city requires, and the "city of St. Louis" hereby agrees to pay said Henry Doering for the above work finished at the rate of one and nineteen one-hundredths ($1.19) dollars per perch of 25 cubic feet of stone, furnished and delivered as directed, payable out of the funds appropriated for the improvement of the wharf
130 under ordinance numbered 8560. This contract is expressly entered into subject to the power of the city engineer to suspend or annul it for a failure or refusal on the part of the contractor to carry on said work properly or any part hereof; and it is also subject to approval or rejection by the city council; and the following provisions of Art. 8, Sect. 18, of an "Act to revise the charter of the city of St. Louis and to extend the limits thereof," approved March 4th, 1870: On ten days' notice the work under said contract may, without cost to or claim against the city, be suspended by the city engineer, with the approval of the mayor, for want of means or other substantial cause: *Provided*, That on the complaint of any citizen and tax-payer that any public work is being done contrary to contract, or the work or material used is imperfect or different from what was stipulated to be furnished or done,

the mayor shall examine into the complaint, and may appoint two or more competent commissioners to examine and report on said work; and after such examination, or after considering the report of said commissioners, he shall make such order in the premises as shall be just and reasonable and what the public interest seems to demand, and such decision shall be binding on all parties; the cost of such examination shall be borne by the contractor if such complaint is decided to be well founded, and by the complainant if found to be groundless. Such suspension or annulment by the city engineer shall not entitle the said contractor to any damages on account thereof, nor shall it in any way affect the city's lawful claim for damages incurred by said contractor's non-performance of the work. And for the faithful performance of all and singular the terms and stipulations of this contract on the part of the said Henry Doering, he, the said Henry Doering, as principal, and
131 Francis P. Becker and F. W. Redecker, as securities, parties of the first part, do hereby bind themselves and their respective heirs, executors, and administrators, unto the said "city of St. Louis," party of the second part, in the penal sum of five thousand dollars, lawful money of the United States, which may be sued for and recovered in full before any court of law having a competent jurisdiction to try the case.

In witness whereof, the said Henry Doering, as principal, and Francis P. Becker and F. W. Redecker, as securities, parties of the first part, have hereunto set their hands and seals respectively, and the city of St. Louis, party of the second part, acting by and through the city engineer aforesaid, has subscribed these presents, the day and year first above written.

HENRY DOERING. [SEAL.]
FRANCIS P. BECKER. [SEAL.]
F. W. REDECKER. [SEAL.]
THE CITY OF ST. LOUIS,
By J. B. MOULTON, *City Engineer.*

CITY COUNCILOR'S OFFICE,
ST. LOUIS, *September 12th*, 1873.

The foregoing agreement and bond are in due form according to law.

ED. P. McCARTY,
City Councilor.

MAYOR'S OFFICE, ST. LOUIS, *Sept. 12th*, 1873.

I hereby approve of the securities in the above bond.

JOSEPH BROWN, *Mayor.*
SAMUEL PEPPER, *Comptroller.*

132 Mr. MEYERS: We object to the contract, if your honor pleases; I don't know what it tends to prove in defense of this case.

Mr. BELL: The ordinance already read in evidence authorizes the

work to be done. I propose to show that it was done under this contract as public work and paid for by the city.

The COURT: I don't see why the plaintiff should object to the contract, inasmuch as it only proves that this work was done by the city; still, if it is objected to, I shall be inclined to exclude it.

Mr. BELL: Well, is it objected to?

Mr. MYERS: Yes.

(Whereupon said contract is excluded, and defendant duly excepted.)

Defendant gave in evidence ordinance No. 8846, which provides an additional appropriation of [8]20,500 for Bryan-street dyke. Approved June 14th, 1874; also, ordinance No. 9812, repealing Ord. No. 8560, which has been read in evidence.

Mr. BELL: I now offer in evidence ordinance 9889—an ordinance to establish and open a wharf from the north line of Anna street southwardly to the southern boundary of the city at the river Des Peres and to repeal part of Ord. 5403.

Ord. 9889.

An ordinance to establish and open the wharf from the north line of Anna street southwardly to the southern boundary of the city at the river Des Peres, and to repeal part of ordinance fifty-four hundred and three.

Be it ordained by the city council of the city of St. Louis:

SECTION 1. The wharf is hereby established as a public highway for wharf purposes, three hundred feet wide from the north line of Anna street to the southern boundary of the city at the river Des Peres, as follows: The west line thereof to commence at a point in the north line of Anna street, where the west line of the wharf, as
133 established by ordinance 540, intersects the same; thence running southwardly in a straight line to a point in St. George addition two hundred and ninety feet east of the east line of First street; thence southwardly to a point in the center line of Dorcas street twenty-two hundred and fifty-two feet east of the east line of Carondelet avenue; thence southwardly to a point in the north line of the United States arsenal tract, produced eastwardly ten hundred and ten feet east of the southern straight linear continuation of the east line of Second street, as laid out in Rock Point addition; thence southwardly to a point in the south line of Bryan street, produced eastwardly three hundred and ninety-five feet east of the east line of First street; thence southwardly to a point in the center of proposed Merrimac street three hundred and twenty feet east — line of Marine avenue produced southwardly, which said centre line of proposed Merrimac street is described as follows: Commencing at the point of intersection of the centre line of Merrimac street, as laid out in the subdivision of the city commons with the southern straight linear continuation of the east line of Marine avenue as laid out in Marine villa addition; thence running eastwardly at an angle of one hundred and three degrees six minutes on its north side with the east line of Marine avenue, produced southwardly; thence the

west line of the wharf to run southwardly to a point in the eastern straight linear continuation of the north line of Neosha street, forty feet wide, thirteen hundred and five feet east of the west line of Oregon avenue; thence southwardly to a point in the center line of Maeder street, produced eastwardly five hundred and forty feet east of the east line of Main street; thence southwardly to a
134 point five hundred and thirty feet east of the east line of Main street in the eastern straight linear continuation of the south line of Adams street fifty feet wide; thence southwardly to a point in the north line of Dover street fifty feet wide, produced eastwardly, three hundred and forty-five feet east of the east line of Main street in the eastern straight linear continuation of the south line of Kansas street fifty feet wide; thence southwardly to a point in the south line of Olive street fifty feet wide, produced eastwardly, ten hundred and ten feet east of the east line of Main street; thence southwardly to a point in the south line of Union street fifty feet wide, produced eastwardly, fifteen hundred and thirty feet east of the east line of Main street; thence southwardly to the southern city limit in a straight line passing through a point in the center line of Lorenz street, produced eastwardly, fourteen hundred feet east of the east line of Clay street, the east line of the wharf to be three hundred feet east of parallel with the west line of the wharf, as herein described.

SECT. 2. So much of ordinance fifty-four hundred and three, entitled "An ordinance to establish and open the wharf from Biddle street to the northern boundary of the city," as relates to the opening of the wharf from the north line of Anna street to the former southern boundary of the city at Keokuk street, is hereby repealed.

SECT. —. The land commissioner is hereby authorized and instructed to cause the wharf, as herein established, to be opened according to law.

Approved January 22nd, 1876.

(Objected to by plaintiff. Objection sustained, and defendant duly excepted.)

135 *J. B. Moulton's Testimony.*

Defendant called J. B. MOULTEN, who, being duly sworn, testified as follows:

Q. Were you city engineer during the time that Bryan-street dike was constructed?

A. I was.

Q. Did you ever visit that work during the construction?

A. Yes, sir.

Q. Was the saw-mill there of Myers and Vahlkamp; did you notice the saw-mill there?

A. I saw a saw-mill there; I never was in it.

Q. What was the object and purpose of the dike?

(Objected to by plaintiff.)

The COURT: I think that objection is well taken.

(Defendant duly excepted.)

Q. What was the effect of the dike, Col. Moulton, so far as forming ground in front of the river bank?

A. Accumulating sediment above and below it.

Q. How did it act?

(Objected to.)

Q. How did it act in forming the ground; what was the process; how did it operate in front of the river?

A. The sediment sifted up from time to time as the river rose and fell, accumulating until it got up to as near as it could to the top of the stones thrown in.

Q. What was the object the city had in view in creating that land outside of the line of the river bank?

(Objected to by plaintiff.)

The COURT: That is substantially the same as the previous question. I think that objection is well taken.

(Defendant duly excepted.)

Q. Was the construction of that dike a part of the scheme for building the wharf that the city established by ordinance 5403?

(Objected to by plaintiff; objection sustained, and plaintiff duly excepted.)

Q. State whether or not the plan that was being pursued in the southern part of the city was substantially the same plan that had been adopted in the northern part of the city.

(Objected to by plaintiff; and objection sustained, and defendant duly excepted.)

Cross-examination:

136 Q. Col., did this deposit of mud and sediment reach or extend west of the low-water mark, or not?

A. Yes, sir.

Q. It did?

A. Yes, sir.

Q. How much west, as near as you can approximate?

A. The end of the stone dike has subsided, gone down, as they do in all cases where it rests upon sand, and at that point the sediment was not as high nor as deep as it would be at other points where the stone was higher. The stone was carried out about that point, except some portion of it that was not quite finished, having stopped by the request of the city authorities. Its general character was to keep about the same, so far as the height of the stone dike was concerned.

COUNSEL: I think likely you didn't quite catch my question.

WITNESS: Well.

Q. What I wanted to know of you was how far west of low-water mark this sediment extended.

A. I don't know that; I can't answer that question; I don't now remember the distance of the low-water mark from the bluff bank.

Q. Can you approximate it?

A. I apprehend that my judgment would be at fault now. The Iron Mountain railroad constructed the embankment.

Q. Was it as much as forty feet from the base of the bluff bank?

A. I have no personal knowledge of that.

Q. Perhaps you can tell by reference to this map. (Map handed to witness.) Do you know which of these lines represents the low-water mark?

A. The shaded line is probly intended for the bank.

Q. The inner blue line?

A. No, the shaded line; that must represent what was considered the bank at that time.

Q. What represented the low-water mark?

A. There is no mark there for the low-water mark. The other lines are simply lines showing the position of the dike.

Q. Did this sediment extend as much as twenty feet, or as much as ten feet of the low-water mark?

137 A. I have no knowledge whatever of that track. If I could recollect anything that would remind me I would state it, but my attention was never drawn to it, and I do not now remember.

Q. You received a communication, did you not, from the plaintiff in this case while you were city engineer?

A. Towards the completion of the work, or rather towards the completion of what was done.

Q. Calling your attention——

(Objected to; that the letter will speak for itself.)

Q. Is this a copy of that letter, if you know? (Handing same to witness.

A. The general tone of the letter is of the character of the one I received, but it is so long ago the text of it I apprehend I hardly would remember. The general character was of that tone. I referred it to the assistant engineer and requested him to visit the place and report to me, which he did.

Q. The plaintiff in the case called on you as city engineer, did he not?

A. Personally.

Q. Not by communication?

(Objected to; that the paper will speak for itself.)

Re-examination by Mr. BELL:

You were saying something about the Iron Mountain road building something down there. What was it?

A. The tracks of the Iron Mountain road were built along there previous to that time.

Q. What effect did they have upon the river?

A. They were above the water in 1844.

Q. Did they encroach any upon high-water mark?

A. Not upon high-water mark. Well, I don't know but what I am incorrect in saying that they were higher than the water of 1844,

for my recollection is their intention was to construct it that way I don't positively know, although I was engineer of the road at one time after that, but I never had occasion to inquire and to know positively.

138 Mr. MYERS: The track was on top of that high bluff bank, was it not?

A. It was on the general high ground of the arsenal where it passes the arsenal.

Q. Did you say whether or not this sediment extended up to that bluff bank?

A. No, sir; I spoke of its settling up in reference to the stone that is put in it.

Q. Did the sediment extend to that bluff bank?

A. Well, at the time I saw it it had not got there, but the expectation was that it would; it was put there for that purpose.

Q. Was the low-water mark east of the bluff bank? Any distance east?

A. Oh, the low-water mark was either at the foot or east of the bluff bank; I was city engineer four years.

Q. You have no impression as to whether it was east of the base of the bluff bank?

A. No, sir; my attention was not called to it; there was a sloping out; there was two grades; two inclinations of the bluff bank.

Julius Rapp's Testimony.

JULIUS RAPP, being duly sworn, testified as follows:

By Mr. BELL: Mr. Rapp, did you have charge of the construction of the Bryant-street dyke?

A. Yes, sir.

Q. You were the city engineer at the time, were you?

A. Assistant city engineer; yes, sir.

Q. When was the work commenced?

A. It was commenced in the winter of 1873 and 1874, about November or December; can't tell exactly the date.

Q. When was it completed?

A. It was never completed exactly; we stopped working about July, 1874.

The COURT: When was it begun?

A. In November or December, 1873.

Mr. BELL: Stopped working in July, 1874?

A. Yes, sir.

Q. What was the first work done, Mr. Rapp?

A. The first work that was done we hauled stone there; hauled wagon loads from the neighboring quarries.

Q. When was the delivery of stone commenced by barges, if any?

A. About May, I believe, or June.

Q. How far did the work progress before you commenced to use barges?

139 A. We built about a hundred feet out into the river upon a stone-bed.

Q. And how was the balance of the work constructed?

A. The balance was done by barges.

Q. How far into the river did the dyke extend?

A. 750 feet exactly from the bank of the railroad [to] the railroad track.

Q. Were the dykes on the Cahokia side built at this time?

A. No, sir.

Q. When were they built?

A. Well, they had the two dykes built previous what we called the Cahokia ferry landings the year previous [in] the spring. The spring before the dyke was commenced.

Q. Was the Pittsburgh dyke built at this time?

A. That was built about eight or ten years before.

Q. What was the effect of the dyke on the river; the Bryan-street dyke?

A. The effect of the dyke—why, we got better water after the dyke after we stopped working.

Mr. MYERS: That wasn't the effect.

A. The effect of the dyke—accumulated sediment.

The COURT: I don't suppose the effect would be anything else.

Mr. BELL: Go on.

WITNESS: To state what the effect of the dyke was?

COUNSEL: Yes, sir.

A. The effect of the dyke was that we got better water at that place than we had before—but accumulation of sediment—river sediment behind and below it, above and below it.

Q. State whether or not those were the purposes for which the dyke was planned and constructed?

(Objected to, by plaintiff, and objection sustained, and defendant duly excepted.)

Q. What was the purpose, Mr. Rapp, of this dyke?

(Objected to by plaintiff; objection sustained, and defendant duly excepted.)

Q. Was the dyke, Mr. Rapp, constructed in pursuance to the ordinance and contract "2940"?

The COURT: You may answer that.

A. Yes, sir.

Q. You had charge of the work as long as it went on, did you, Mr. Rapp?

A. Yes, sir.

140 Q. Did you visit the saw-mill of the plaintiff there?

A. I was there every week two or three or four times.

Q. Did you ever see the plaintiff there?

A. I saw him there walking about the place.

Q. Did you see his saw logs in the river that he claims to have lost there afterwards?

A. Yes, sir; I saw two saw logs lying below the dyke.

Mr. MYERS: How many?

A. Two logs.

Q. Where were the rest of them?
A. The rest of them? I could see nothing of them.
Q. Did you see any saw logs washed off or carried off?
A. I didn't.
Q. Any lost?
A. There couldn't be none washed off, because the dyke——
Mr. MYERS: The question was, whether you saw any?
A. I did not.
Mr. BELL: State whether or not, Mr. Rapp, at any time when you were there you saw any of the plaintiff's saw logs washed away or buried in the mud?
A. I did not.
Q. Didn't see anything of that sort?
A. I saw two logs lying below the dyke.
Q. Is that all you saw?
A. A few buried in the mud.
Q. Well?
A. That is all I saw.
Q. State whether or not the other logs there were being taken out from time to time to use in the mill?
A. The saw logs had been hauled out as often as I had been there; they had been hauling logs out.
Q. To the mill?
A. To the mill.
Q. Up the tunnel spoken of?
A. Up this slide; yes, sir.
Q. Did you notice any change at all in conducting the milling business there at this time or at any time during the progress of the work? State whether or not it went on as usual.
A. I didn't see much change there at the time when I built the dyke. When I went down there I didn't see much change.
Q. Did you ever have any conversation with the witness Hussman, who was the engineer there at that mill?
A. Yes, sir; I did.
Q. Did you ever talk with him about the saw logs?
A. Yes, sir.
Q. Did you ever ask him whether they had lost any saw
141 logs or anything of that sort?
A. He told me plain and distinctly they got all the saw logs, excepting two, lying there; got them all out.
Q. Did you ever have any talk with the plaintiff?
A. No, sir; he never spoke a word to me at all.
Q. Were you there every day during that time, Mr. Rapp?
A. I was there most every day, if not every day, during the process of the building of the dyke during the delivery of the stone by barges.
Q. How long did you stay there during the day?
A. Half a day—three-quarters of a day—two or three hours.

Cross-examination by Mr. MYERS:

Q. You say the plaintiff didn't speak to you?

A. Never did.

Q. Did you ever speak to him?

A. Never did in my life; never in my life spoke a word to him that I recollect.

Q. How frequently did you speak to Hussman?

A. To Hussman? Well, often, because I knew the old man, and we talked together considerably. He came down when he saw me with my instruments around there, and stood by, furnished me sticks, and loaned me an axe, and so on.

Q. How long were you in charge of the work?

[A.] In charge of the work; what work? I was twenty years in charge of city work and 18 years on the river bank.

Q. That work—that dyke.

A. That work, I was in charge of from the start to the end.

Q. When did you quit there?

A. I quit there about July, to my recollection.

Q. How long have you been in the employ of the city in the engineer department?

A. Twenty years.

Q. You remember that bank down there very well?

A. Very well. I know that for thirty years.

Q. How frequently, Mr. Rapp, have you been down there since the dyke was built?

A. I was only there but once.

Q. Only once since it was built?

A. Since it was built; yes, sir.

Q. When was that?

A. That was when Col. Moulton, the city engineer, received
142 a letter. That was after we stopped, you know.

Q. How long after you stopped was that?

A. It might have been two or three weeks, or four weeks.

Q. How far in was that deposit at that time?

A. At that time? About fifty to seventy-five feet from the bank out into the river.

Q. Extending from that bluff bank out into the river?

A. From that bluff bank out into the river.

Q. And from the dyke how far north?

A. How far north? Maybe two hundred feet—something like it. Just a measure like in a curve.

Q. And about how deep was it at that time?

A. That I couldn't say, how deep.

Q. Can you take this map and give us an idea about how far from the bank the low-water mark was?

(Witness is handed map made by Mr. Pitzman.)

A. The low-water mark?

Q. Yes; that is, as near as you can.

A. The low-water mark?

Q. Yes; ten, thirty, or forty feet, whatever it was.

A. I don't know what you call low-water mark; I don't know what you mean; what do you call low-water mark?

COUNSEL: I don't know.

A. The low-water mark is as far out as the rock goes, about 150 feet. There is a rock bottom there, you know, where at low-water steamboats can't land at all within one hundred and fifty feet from the high bank, which we call the railroad track.

Q. Mr. Rapp, you of course know what is understood by the low-water mark and high-water mark, do you not?

A. Yes, sir.

Q. That is what I want.

A. Low-water mark is 72 feet 10 inches below the city *directrix*.

Q. How far at that point is that low-water mark east of that bluff bank?

A. That may be 200 feet out; I never took a level there.

Q. Is it about that; do you think it is about that distance?

A. About that distance; about 200 feet.

Mr. BELL: You say you visited the premises afterwards? About what time was that, Mr. Rapp?

A. That was about three or four weeks after we ceased working, to my recollection; at the time Col. Moulton received the letter from Mr. Myers.

143 Q. You went down under instructions from Colonel Moulton?

A. I went down under instructions from Colonel Moulton, to see the location of the logs and the situation in the matter in general. I made an inspection, but I could see no logs, excepting those two logs half way in the mud. They were got out afterwards I understand.

Q. That is all, sir.

Mr. BELL: I offer in evidence that lot that has been used here on the part of the plaintiff.

The COURT: Well, any objection to that?

Mr. MYERS: Yes, sir.

The COURT: You may show it to the jury, Mr. Bell.

Mr. BELL: That is our case Mr. Myers. We rest.

There was no other testimony.

(Here follows map, marked page 143.)

Instructions Given for Plaintiff.

The court gave the following instructions to the jury upon plaintiff's behalf:

1st. The court instructs the jury that a person owning a lot of ground bordering on the Mississippi or other navigable river, and bounded thereby, or having a leasehold estate in such lot, has not only the right lawfully to use and navigate such river for purposes of business in common with and as one of the general public, but in addition thereto, he has also a right known as a riparian right, growing out of and founded upon his title or ownership of the bank of the stream. The riparian right exists, notwithstanding the title to the soil in the bed of the stream belongs to the general public,

and included in this right is exclusive access to and from the navigable point of the river at that particular point, and other special facilities for gain or for pleasure, which the location of his land so situated affords. This riparian right is in itself property, and cannot be destroyed or materially impaired without compensation to the owner of the same.

2. Therefore, if the jury find from the evidence that the
144 plaintiff at the time stated in his amended petition was the owner of the leasehold term therein described, in the lot fronting on said river; that there was a saw-mill and appurtenances for running a steam saw-mill upon the said lot, and that the nature of the bank and bed and current of the river and the location of the channel at that point afforded plaintiff valuable facilities of access to the river at that point for conducting his said saw-milling business; and if the jury further find that the defendant caused to be built the dyke in controversy in this cause prior to the bringing of this suit, and that by the building of said dyke the said natural channel of said river and the original water line at said point were thrown some hundreds of feet east of their natural location as they were located before the building of said dyke, and that by the building of said dyke a deposit of mud and sediment was left between the bluff bank at that point and the water's edge, thereby impairing materially the facility of access to the navigable waters of said river at that point which plaintiff had theretofore enjoyed, then the jury should find a verdict for the plaintiff and assess his damages at such sum not exceeding the amount claimed, as under the evidence the jury will compensate him for the injury sustained to his property or estate. In case the jury find for the plaintiff, then (inasmuch as the riparian right above spoken of is a right appurtenant to the leasehold estate) the jury may take into consideration how much, if any, the value of plaintiff's leasehold estate was lessened by the act of defendant in building the dyke, and the amount it was so lessened in value, and the value of any logs that were lost directly in consequence of the same act of defendant, will be the measure of
145 plaintiff's damages. The burden of showing the amount of his damages rests upon the plaintiff, and the jury should only allow such direct damage of the kind above indicated as the plaintiff has proven to their satisfaction during the progress of this trial. And to the giving of each of said instructions the defendant at the time duly objected and excepted.

Defendant's Instructions Given.

On motion of defendant the court gave the following instructions:

The court instructs the jury that the burden of proof is upon the plaintiff to establish his case by evidence satisfactory to the minds of the jury, and if the plaintiff has failed to do this the jury will find a verdict for the defendant.

The defendant moved the court to give the following instructions:

The court instructs the jury that under the pleadings and evi-

dence the plaintiff is not entitled to recover, which was refused by the court, and defendant duly excepted. The jury found a verdict in favor of plaintiff for thirty-five thousand dollars. Afterwards and on the same day and during the term the defendant moved for a new trial in words and figures following:

Motion for a New Trial.

In the Circuit Court of the City of St. Louis.

JOHN Q. MYERS *vs.* THE CITY OF ST. LOUIS.

Defendant moves the court to set aside the judgment of the court and grant a new trial for the following reasons: 1. The court erred in excluding competent and legal testimony offered by the defendant, and excluded by the court. 2. The court erred in admitting incompetent and illegal testimony offered by plaintiff, and objected to by defendant. 3. The court erred in admitting any testimony under the petition because no cause of action is stated therein. 4. The court erred in overruling the motion made by defendant to require plaintiff to elect on which cause of action he would proceed, whether as to the loss of saw-logs or the alleged damage to the leasehold. 5. The petition does not state a cause of action. 6.
146 The court erred in refusing to non-suit plaintiff. 7. The court erred in refusing the instructions offered by the defendant and refused by the court. 8. The court erred in giving the instructions given by the court and each of said instructions. 9. The verdict is against the law and the evidence both, and is against the weight of the evidence, and is excessive and exorbitant in amount. 10. The jury were improperly and illegally instructed. 11. The law of the case was not properly laid down by the court in the instructions given to the jury.

LEVERETT BELL,
For Defendant.

Motion & Arrest of Judgment.

And also on the same day, and during the term, defendant moved in arrest of judgment in words and figures following, to wit:

JOHN Q. MYERS *vs.* THE CITY OF ST. LOUIS.

Defendant moves the court to arrest the judgment herein, because the petition does not state facts sufficient to constitute a cause of action. Because the verdict is not responsive to the issues. Because it is attempted to commingle distinct and separate alleged causes of action in one count.

LEVERETT BELL, *For Def't.*

And said motions were afterwards overruled by the court, and defendant then and there duly excepted.

That the foregoing proceedings may be preserved, defendant pre-

sents this bill of exceptions, praying that the same may be signed, sealed, and allowed, and made a part of the record, which is accordingly done April 23rd, 1879.

AMOS M. THAYER, *Judge.* [SEAL.]

And afterwards, at the April term of said court, the following proceedings were had in said cause, to wit:

147 *Appeal Granted to St. Louis Court of Appeals.*

THURSDAY, *April 24th*, 1879.

JOHN Q. MYERS *vs.* CITY OF ST. LOUIS.

Now comes defendant, by attorney, and files herein an affidavit for appeal, and on motion an appeal is hereby granted said defendant to the St. Louis court of appeals from the judgment rendered herein.

Appeal bond filed and approved.

Affidavit for Appeal.

In the Circuit Court, April Term, 1879.

JOHN Q. MYERS *vs.* CITY OF ST. LOUIS.

Henry Overstolz, mayor of St. Louis, being duly sworn, makes oath and says: That the appeal prayed for in the above-entitled cause is not made for vexation or delay, but because the affiant believes the appellant is aggrieved by the judgment or decision of the court.

HENRY OVERSTOLZ,
Mayor of the City.

Appeal Bond.

Know all men by these presents, that the city of St. Louis, as principal, is held and firmly bound unto John Q. Myers in the sum of eighty thousand dollars, for the payment of which well and truly to be made, it binds itself firmly by these presents.

Sealed and dated at St. Louis, this twenty-second day of April, A. D. 1879.

The condition of the above obligation is such, that whereas the city of St. Louis has appealed from the judgment rendered against it and in favor of John Q. Myers, in the circuit court of the city of St. Louis, for thirty-five thousand dollars, together with costs:

148 Now, if said appellant shall prosecute its appeal with due diligence to a decision in the St. Louis court of appeals, and shall perform such judgment as shall be given by the St. Louis court of appeals, or such as the St. Louis court of appeals may direct the circuit court of St. Louis to give, and if the judgment or any part thereof be affirmed, and pay all damages and costs which may be awarded against it by the St. Louis court of appeals, then this obligation be void; otherwise to remain in full force and effect.

CITY OF ST. LOUIS, [SEAL.]
Per H'Y OVERSWOLTZ.

Approved in open court April 24th, 1879.
Attest: CHS. F. VOGEL, *Clerk.*

STATE OF MISSOURI, } ss:
City of St. Louis, }

I, Charles F. Vogel, clerk of the circuit court, city of St. Louis, certify the foregoing to be a true and correct transcript of the record and proceedings in the case of John Q. Myers against the city of St. Louis, as fully as the same remain in my office.

In testimony whereof, I hereto set my hand and affix the seal of said court, at office in the city of St. Louis, this fifth day of June, 1879.

CHARLES F. VOGEL, *Clerk.* [SEAL.]

And afterwards, at the October term, A. D. 1879, of the St. Louis court of appeals, to wit, on the 13th day of October, 1879, the following assignment of errors was filed in said cause, to wit:

In the St. Louis Court of Appeals. October Term, 1879.

JOHN Q. MYERS, Respondent, }
vs. } No. 1494.
THE CITY OF ST. LOUIS, Appellant. }

And now comes the said appellant and says that in the
149 record and proceedings of the court below in the above-entitled cause there is manifest error, and for error said appellant assigns the following, to wit:

1. That said court admitted improper and illegal testimony offered by respondent.
2. That said court rejected proper and legal testimony offered by appellant.
3. That the court gave to the jury improper and illegal instructions.
4. That the court refused to give to the jury proper and legal instructions offered by appellant.
5. That the verdict was against the evidence.
6. That the verdict was against the law.
7. That the verdict was against the both law and evidence, and against the law under the evidence.
8. That the verdict was against the weight of evidence.
9. That the judgment was rendered in favor of the respondent, when it should have been rendered for the appellant. That said court overruled the motion for a new trial made by appellant.

EVERETT BELL,
For Appellant.

And now comes the respondent and for joinder in error says there is no error in the record and proceedings of said court below in said cause as assigned by said appellant.

NATH'L MYERS WITH
GLOVER & SHEPLEY,
Att'y for Res't.

And afterwards at the same term of said court the following further proceedings were had in said cause to wit, Tuesday, January 27th, 1880.

Appeal from the Circuit Court of the City of St. Louis.

JOHN Q. MYERS, Respondent,
vs.
THE CITY OF ST. LOUIS, Appellant.

Now again come the parties aforesaid by their respective
150 attorneys, and the court being now sufficiently advised of and concerning the premises doth consider and adjudge that the judgment rendered herein of the said circuit court of the city of St. Louis be in all things affirmed and stand in full force and effect, and that the said respondent recover of the said appellant his costs and charges herein expended and have execution therefor.

Opinion filed. Judge Lewis absent.

Which opinion, is in the words and figures following, to wit:

Appeal from the St. Louis Circuit Court.

JOHN Q. MYERS, Respondent, }
vs. } 1494.
THE CITY OF ST. LOUIS, Apellant. }

The petition alleges that defendant, as a municipal corporation, created under the laws of Missouri, had charge of the duty of improving the streets and wharfs of the city of St. Louis. That plaintiff, for the purpose of carrying on his steam saw-mill business, had acquired, and, at the time of the grievances complained of, owned a leasehold. The lot is described as fronting one hundred and sixty-two feet on the Mississippi river, bounded west by Second street, and south by Bryan street. The lease was for a term of ten years from 1st January, 1870, with the right to remove the improvements. Plaintiff had erected a steam saw-mill and other valuable improvements on the lot connected with the mill business; he alleges that the term, at the time of the injury complained of, was worth 30,000 dollars, and that the lease was obtained and the building erected because the depth of the water and nature of the ground enabled plaintiff to land large rafts of timber in front of his lot; that the natural channel of the Mississippi was in front of plaintiff's lot; and that
151 this was essential to keep up a sufficient depth in front of his lot to enable rafts of timber to land there, so that they might be at slight cost conveyed to the mill; that the foot of Bryan street is but a few hundred feet from the saw-mill; and that that street runs east to the river on the south side of plaintiff's lot; that in July and August, 1874, defendant unlawfully caused a dyke, twenty feet broad by seven hundred feet long, to be built across the channel of the river from the bed to the surface, extending from the foot of Bryan street, which directed the river from its natural channel, and threw it many hundred yards to the east, causing the formation of a deposit of mud along the entire front of plaintiff's prem-

ises, six feet deep and a hundred feet wide, and making the water so shallow that during the continuance of the lease it would be impossible to land timber in front of the premises; that there is no other way of getting timber to the saw-mill; and that the obstruction and diversion of the river has entirely destroyed the value of the lease; that at the time this dyke was built plaintiff had heavy timber, worth $10,000, in rafts, landed in front of his premises, and belonging to him, and apparatus by which the same would have been hauled; and that in consequence of the dyke this timber sunk in the mud, and could not be extricated, and was wholly lost. Plaintiff asks damages in the sum of forty thousand dollars.

Defendant states in its answer that it is a municipal corporation, created in 1822; and that its eastern boundary has always been the Mississippi river; that the dyke is a continuation of Bryan street towards the eastern boundary of the city, and entirely within the city limits; that by an act, approved March 3rd, 1857, concerning swamp lands in St. Louis county, the State granted to
152 defendant all lands owned by the State not reserved for public purposes within the city limits, and that the United States, by act of 12th June, 1866, granted to defendant in fee-simple all the right and title of the United States to all wharfs and public thoroughfares within the city; and that by the city charter of 1870 defendant was authorized to construct all needful improvements in the harbor, comprising the bed, channels, bayous, bars, and islands of the river, from the Missouri to the Merrimac, to deflect the currents of the river and regulate and repair public wharves and docks. That at the time of the alleged injuries the public wharf was and had long been established and opened in front of these premises, and included the landing in question north and south and east as far as the Bryan street dyke extends; that Bryan street, before the date named by plaintiff, was a duly established public street, extending over seven hundred feet into the river and to the east line of the wharf; that before the alleged grievances Bryan street was constructed only to the water's edge, and that the defendant, being authorized to do so, for the purpose of completing Bryan street, and of deflecting the dangerous current, constructed the street so far as it had been lawfully established, and that this is the dyke complained of. The replication denies all allegations of new matter. There was a verdict and judgment for plaintiff for thirty-five thousand dollars. On the trial plaintiff introduced evidence tending to prove the allegations of his petition, that he had before the dyke was built an exceptionally valuable mill site, and that it was totally destroyed by the erection of the dyke—facts that are not seriously disputed.

153 If plaintiff was entitled to recover at all, it is not pretended that the verdict was excessive. The only point upon which appellant insists before us is the right of plaintiff to maintain the action. As a riparian proprietor, plaintiff owned the land to the water's edge. Under the acts of Congress and the system of surveys adopted by the United States, the Mississippi river is a navigable stream. (Brenson *vs.* Morrow, 61 Mo., 51.) The question of

ownership of the soil under it and other great navigable streams of the United States is one that has been differently settled in different states. Some states hold that the riparian proprietors own *usque ad filliam aquæ;* other States hold that he owns only to the water's edge. The question of the ownership of the soil under the water is one which each State is at liberty to determine for itself; and if it chooses to concede the right of the riparian owner to the center of the stream, it is not for others to raise objections, as is said by the Supreme Court of the United States in Barney's City of Keokuk, 4 Otto, 324. In Missouri the riparian proprietor owns only to the water's edge. (Benson *vs.* Morrow, *supra.*) This can make little difference in the present case, or, we conceive, in any case. The right to use the stream as a public highway is not involved. The right exists in the public wherever the title terminates. "Whether the title of the owner of such a lot extends beyond the dry land or not, he is certainly entitled to the rights of a riparian proprietor whose land is bounded by navigable streams; and among those rights one is access to the navigable part of the river from the front of his lot, the right to make a landing, wharf, or pier, subject to such
154 general rules and regulations as the Legislature may see fit to impose for the protection of the rights of the public, whatever those may be." This is the language of Judge Miller in Yates *vs.* Milwaukee, 10 Wall., 504. "The right of a riparian proprietor," says Lord Selbourne, in Lyons' Fishmonger's Com. L. R., 1 App. Cas., 662, "so far as they relate to any natural stream, exist *jure naturæ*, because his land has by nature the advantage of being watered by the stream; and if the facts of nature constitute the foundation of the right, I am unable to see why the law should not recognize and follow the course of nature in every part of the same stream. * * * With respect to the ownership of the bed of the river, this cannot be the natural foundation of riparian rights, properly so called, because the word "riparian" is relative to the bank and not to the bed of the stream, and the connection, when it exists, of property on the bank with property in the bed of the stream depends not upon nature, but upon grant or presumption of law. * * * It is necessary for the existence of a riparian right that the land should be in connection with the flow of the stream. * * * Even if it could be shown that the riparian rights of the proprietor of the land on the bank of a tidal navigable river are not similar to those of a proprietor above the flow of the tide, I should be of opinion that he had a right to the river frontage belonging by nature to his land, although the only practicable advantage of it might consist in the access thereby afforded him to the water for the purpose of using when upon the water the right of navigation common to him with the rest of the public. Such a right of access is his own, and it is his by virtue and in respect of his riparian property; it is
155 wholly distinct from the public right of navigation." Undoubtedly at common law both in England and America, and under the common law and civil law doctrines as modified after the systems of surveys established after the acquisition of the N. W. territory, every person owning on the banks of the Mississippi has

the right to use the water in its natural stream without diminution or alteration. He has a right that it should flow *ubi currere solebat.* (Bearby *vs.* Shaw, 6 East., 208; Lyon Fishmonger Com. L. R., 1 H. L. Cas., 662; Delaplaine R. R. Co., 42 Wis., 214; Yates *vs.* Milwaukee, 10 Wall., 497; Tyler *vs.* Wilkman, 4 Madem, 397; Trinceum Fishing Co. *vs.* Carter, 61 Pa., 21; 1 Dill. Corp., Sect. 70–72; O'Fallon *vs.* Doggett, 4 Mo., 345.)

The right to have the river flow by his land as it flowed by nature, and the right of access to the river at this point, were rights of plaintiff, as riparian owner, additional to his right, as one of the general public, to use the river as a highway. His rights to access were exclusive, subject to the general easement in the public to use the river for purposes of navigation, and to make a temporary landing there when the exigencies of the case might require it. And this right was the property of plaintiff.

"It is a right," says the Supreme Court of the United States, in Yates *vs.* Milwaukee, *supra*, "of which, when once vested, the owner can only be deprived in accordance with established law, and, if necessary, that it be taken for the public good, upon just compensation."

"Such riparian rights," says Judge McLean, in Bowman *vs.* Nathen, 2 McLean, 376, "frequently constitute the chief value of river property; and to deprive an owner of them without compensation is to despoil him of a most valuable property."

That the destruction of the riparian right of plaintiff was such a taking of private property as to come within the limitation
156 on the exercise of the right of eminent domain contained in the State constitution, is clear, we think, both on reason and authority.

On this point we may refer to most of the cases cited above, and also to Pampelly *vs.* Green Bay Co., 13 Wall., 166; Eaton *vs.* B., C. and M. R. R., 51 N. H., 504 (where the leading cases on the question as to what constitutes a taking of property within the meaning of the constitutional limitation are most exhaustively considered and carefully classified), and Conner *vs* Kempshall, 26 Wend., 404.

It is urged that it is the settled doctrine in this State that a municipal corporation, in the absence of negligence, is not answerable in a civil action for consequential damages arising from the execution of a public work which it is authorized by the State to engage in. The principle is a correct one, and, as is remarked in Pampelly *vs.* Green Bay Co., the decisions have gone to the utterinost limit of judicial construction in favor of it, and in some cases beyond it. In many of the highway grade cases, however, the cities, whilst injuring private property, have not exceeded the strict legal rights of *coten niures* proprietors; and in others of them the user of public property was not unreasonable, for the reason stated by Judge Napton, in Taylor *vs.* St. Louis, 14 Mo., 20, that the probability of a change of grade was a circumstance which might have been considered and calculated upon when the lot was purchased or the building erected. The fact that a man owns a lot of ground does not give him rights which deprive his neighbor or the general pub-

lic of their rights. The general public has a right to use and improve the highway, and a reasonable use of proprietary rights may lead to consequences which make the occupation of the neighboring lot less convenient; but there is not necessarily in this a taking of property within the meaning of the constitutional limita-
157 tion, and these chances are foreseen and calculated upon. But the building of a dyke into the Mississippi, by which its stream is diverted from a lot which derives its value from its water front, cannot be assimilated to these cases of remote and consequential damage; and if, as we have seen, riparian rights are property, it cannot be said that this is not a taking of property. The owner of land through which a stream of water flows has no property in the water, though he has a legal right to the use of the water, and this is property of which he cannot be deprived without just compensation without his consent. At a time when the constitution of New York contained no provision against taking private property for public purposes without compensation, Chancellor Kent enjoined the trustees of a town from diverting a center course for public uses under an act of the Legislature because the act made no provision for compensation. (Gardner *vs.* Newburgh, 2 Johns. Ch., 162.)

The rights of a riparian proprietor on a navigable stream are not precisely the same as those of one who owns both banks of a smaller river, but they are not less real, not less property; and though in neither case is the property in the water itself, which *labitur et labitur in aeternum*, in both cases there is a valuable right not to have the water divested from its accustomed course, and in both cases the division of the stream is a taking of property. The Legislature cannot authorize the direct taking of property without compensation for any public work, however necessary, and the British Parliament, which is restrained by no written constitution, and has all the powers of a constitutional convention with us, never strips the subject of his property without full compensation, no matter what may
158 be the exigency, and exerts its power of compelling an alienation by the owner at a reasonable price only in case of public necessity and with great caution. (Black, 139.)

When it is settled that riparian rights are property, and of this there seems to be no doubt, the question as to the right to take them without compensation is at an end.

We are referred to the N. Transportation Co. *vs.* Chicago, a case recently decided by the Supreme Court of the United States, but not yet reported. But that case does not seem to overrule Yates *vs.* Milwaukee, and the other cases cited above. The case was one of obstruction to a street by the city building a coffer-dam. The court decided that this was not a public nuisance, because authorized by law. The inconvenience was temporary; if the owner had been permanently deprived of the use of the street, the case would have been different. In that case, under the ruling of our supreme court in Lackland *vs.* N. M. R. R., 31 Mo., 181, the owner could not have been deprived of his right to use the street without compensation. The right of the owner of a lot in a town to the use of the adjoining street

is declared by our supreme court in the case just cited to be as much property as the lot itself, and that it is immaterial whether he owns to the middle of the street or not. So the right of a riparian proprietor to the flow of the water in front of his lot is as much property as the lot itself, and it is immaterial that he does not own to the middle of the stream. It is impossible to see why the property can be taken in one case and not in the other. There is nothing in the defense that the river was diverted to make a new wharf line. The charter of the city in force at the time (Art. VIII, Sec. 1) provides
that "whenever the city shall provide by ordinance for
159 establishing * * * or altering any * * * wharf, * * * and it becomes necessary for that purpose to take private property, just compensation shall be paid to the owner."

And afterwards, at the same term of said court, the following further proceedings were had in said cause, to wit:

TUESDAY, *February 3rd*, 1880.

JOHN Q. MYERS, Respondent, *vs.* THE CITY OF ST. LOUIS, Appellant.

Now, at this day, comes the said appellant, by its attorney, and filed its affidavit for an appeal herein, and on its motion an appeal is granted to the supreme court of the State of Missouri from the judgment herein rendered. It thereupon files an appeal bond in the penal sum of eighty-five thousand dollars, which bond is by the court approved.

Said affidavit and bond are respectively in the words and figures following, to wit:

Affidavit for Appeal.

In the St. Louis Court of Appeals.

JOHN Q. MYERS *vs.* THE CITY OF ST. LOUIS, Appellant.

Before St. Louis Court of Appeals, October Term, 1879.

THE STATE OF MISSOURI, *ss:*

Henry Overstolz, mayor of the city of St. Louis, being duly sworn, makes oath and says: That the appeal prayed for in the above-entitled cause is not made for vexation or delay, but because the affiant believes that the appellant is aggrieved by the judgment or decision of the court.

HENRY OVERSTOLZ, *Mayor.*

Sworn and subscribed to before me, this 27th day of Jan.,
160 A. D. 1880.

[SEAL.]

GEORGE A. SCHULTE,
Notary Public, City of St. Louis, Mo.

On —— Nov. 19th, 1878. Em. Express, Nov. 14th, 1880.

Know all men by these presents, that the city of St. Louis, as principal, is held and firmly bound unto John Q. Myers in the sum of

eighty-five thousand dollars, for the payment of which well and truly to be made it binds itself by these presents.

Sealed and dated at St. Louis, this twenty-seventh day of January, A. D. 1880.

The condition of the above obligation is such that, whereas, the city of St. Louis has appealed from the judgment rendered against it, and in favor of John Q. Myers, in the St. Louis court of appeals.

Now, if said appellant shall prosecute its appeal with due diligence to the decision of the supreme court and shall perform such judgment as shall be given by the supreme court or such as the supreme court may direct, the St. Louis circuit court in the city of St. Louis, State of Missouri, to give; and if the judgment, or any part thereof, be affirmed, will comply with and perform the same, as far as it may be affirmed, and pay all damages and costs which may be awarded against it by the supreme court, then this obligation to be void; otherwise to remain in full force and effect.

Approved in open court, the 3rd day of February, 1880.

Attest: JOSEPH F. BAIER, [SEAL.]
Clerk.

CITY OF ST. LOUIS. [SEAL.]
per H. OVERSTOLZ, *Mayor.* [SEAL.]

STATE OF MISSOURI, *ss:*

I, Joseph F. Baier, clerk of the St. Louis court of appeals, cer-
161 tify that the above and foregoing is a full, true, and complete transcript of the record and proceedings in the above-entitled cause, as fully as the same remain on record and on file in my office.

In testimony whereof, I hereunto set my hand and affix the seal of said court, at office in the city of St. Louis, this 24th day of February, 1880.

JOSEPH F. BAIER, *Clerk.*

Proceedings in the Supreme Court of Missouri.

And afterwards, to wit, on the 15th day of November, A. D. 1882, the following assignment of errors was filed in the supreme court of Missouri, in said cause, to wit:

162 In Supreme Court of the State of Missouri. October Term, 1882.

JOHN Q. MEYERS, Respondent,
vs.
THE CITY OF ST. LOUIS, Appellant.

And now come the said appellant, and says that in the records and proceedings of the circuit court below, in the above-entitled cause, there is manifest error, and for error said appellant assigns the following, to wit:

1. That said court admitted improper and illegal testimony offered by plaintiff.

2. That said court rejected proper and legal testimony offered by defendant.

3. That the court gave the jury improper and illegal instructions.

4. That the court refused to give the jury proper and legal instructions offered by defendant.

5. That the verdict was against the evidence.

6. That the verdict was against law.

7. That the verdict was against both law and evidence, and against the law under the evidence.

8. That the verdict was against the weight of evidence.

9. That the judgment was rendered in favor of the plaintiff, when it should have been rendered for the defendant.

10. That said court overruled the motion for a new trial made by the defendant.

And the appellant assigns as error the action of the St. Louis court of appeals affirming the judgment of the circuit court.

LEVERETT BELL,
For Appellant.

And afterwards, to wit, on December 7th, A. D. 1882, the following joinder in error was filed in said cause, to wit:

And now come the respondent, Jno. Q. Myers, and for joinder in error say, there is no error in the record and proceedings of said courts in said cause, as assigned by said the appellant.

U. MYERS &
GLOVER & SHEPLEY, *Att'ys.*

163 And afterwards, to wit, on the 8th day of December, A. D. 1882, the following further proceedings were had in said cause, to wit:

JOHN Q. MYERS, Resp., *vs.* CITY OF ST. LOUIS, Appellant.

Appeal from St. Louis Court of Appeals.

Now, at this day come the parties, by attorneys, and enter upon the argument of this cause, but before the same is concluded, the hour of adjournment having arrived, it is ordered that argument be suspended until to-morrow.

And afterwards, to wit, on the 9th day of December, 1882, the following proceedings were had in said cause, to wit:

JOHN Q. MYERS, Resp., *vs.* CITY OF ST. LOUIS, Appellant.

Appeal from St. Louis Court of Appeals.

Now, at this day come the parties, by attorneys, and conclude the argument herein, and submit this cause to the court.

And afterwards, to wit, on the 24th December, A. D. 1883, the following further proceedings were had in said cause, to wit:

164 JOHN Q. MYERS, Respondent, *vs.* CITY OF ST. LOUIS, Appellant.

Appeal from St. Louis Court of Appeals.

Now, at this day come the parties aforesaid, by their respective attorneys, and the court here being now sufficiently advised of and concerning the premises, do consider and adjudge that the judgments aforesaid in form aforesaid by the St. Louis court of appeals, and the circuit court of the city of St. Louis rendered, be reversed, annulled, and for naught held and esteemed, and that the said appellant be restored to all things which it has lost by reason of the said judgments. It is further considered and adjudged by the court that the said appellant recover against the said respondent all the costs accruing in this cause, and have therefor execution.

Opinion Filed.

Which said opinion is in the words and figures following, to wit:

165 JOHN Q. MYERS, Resp., *vs.* THE CITY OF ST. LOUIS, App.

Appeal from the St. Louis Court of Appeals.

Reporter State case.

Opinion of the Court.

Action for damages done to plaintiff as the owner of certain riparian rights.

He was the owner of a certain leasehold on which his saw-mill was situated, and the injury complained of consisted in the so-called improvements in the shape of a dike, or something of that sort, which the city had built, extending out into the channel of the Mississippi river several hundred feet, thereby filling up the channel at that point and causing such a deposit of sediment or mud next to the shore as effectually destroyed the landing place which plaintiff had been accustomed to use for the purpose of bringing logs to the shore in front of his mill, and caused also the submersion and loss of his logs. The lease under which plaintiff claimed is in these words:

"A lot of ground in St. Ange Addition to the city of St. Louis, a plat whereof is on file," &c., * * * "having a front of 162 feet on Front street, as laid out on said plat, and extending west to Second street, excepting a 60-foot street, called First street, and an alley between said First and Second streets, which said street and alley are to be left open for public use; bounded north by the land of Harney, east by the Mississippi river, south by Bryan street, and west by Second street, as laid out by said plat, in block No. —, in the city of St. Louis."

Under a proper construction of this lease we have no doubt that the plaintiff was the possessor of riparian rights. It is true that in the lease the recital is made that the lot of ground has "a front of 162 feet on Front street," etc.; but this recital, in our opinion, con-

stitutes no part of the metes and bounds of the lot, and is by no means inconsistent with, or repugnant to, that portion of the lease in which the boundaries of the leased ground are definitely and distinctly described. Besides, one of the first rules of construction, in case of ambiguity arising in a deed, is that natural monuments and objects called for in the deed shall control, though they should conflict with the courses and distances called for in the deed. And when such deed, in its description of the grant of land made, calls for a river as a boundary, this call will prevail. (Shelton *vs.* Maupin, 16 Mo., 124; 3 Washburn R. Prop., pp. 405, 406, 407, 408, and cases cited.) And if doubt as to the intention of the parties to the deed in question should still remain, resort could be had to the surroundings of the parties at the time the lease was executed. (*Ib.*, 404; 1 Gef Evid., sec. 288.)

The land leased had been in the possession of Mrs. Boyce, the lessor, since 1851. It had been leased by her to Ludlow & Co. many years, and that firm had built a saw-mill on it, and had used the facilities furnished by the river for getting saw logs to the mill, just as Myers & Vollkamp, their successors, continued to do after the lease was made to them.

Taking all these things into consideration, it would seem impossible to differ as to the proper conclusion to be reached touching the force and effect of the terms employed in the lease. Counsel for defendant cites us to the case of Schools *vs.* Risley, 77 U. S., 91, as deciding that calls for the Mississippi river, in conveyances from one private individual to another for lots in St. Louis, give no riparian rights to the grantee.

The syllabi of that case do decide that point, but the opinion of the court does not. The only point in judgment there was that if the property owned by the defendant, a certain block, was bounded on the east by a street, passage-way, or tow-path, that then the defendant was not the possessor of riparian rights, and, of consequence, not entitled to the right of accretion as incident to those rights, but that such rights were possessed by the defendant if the river, when the town of St. Louis was laid out, and when the act of confirmation was passed, constituted the eastern boundary of the block. This view of that case and what it decided certainly accords with the authorities cited therein with approval (Jones *vs.* Soulard, 24 How., 41; Smith *vs.* Public Schools, 30 Mo., 301; Le Beau *vs.* Gaven, 37 Mo., 556); and with the view taken in the same case in this court (40 Mo., 358), the judgment of this court being affirmed on appeal, where it is expressly decided, reference being made to the same authorities, that if the river is the boundary of a town lot it will be riparian as much as would a tract of land in the country. This view accords also with that taken in Yates *vs.* Milwaukee, 77 U. S., 497, where it is held that the owner of land bounded by a navigable river has certain riparian rights, whether his title extends to the middle of the stream or not.

166 The force and effect of the terms of the lease to Myers & Vollkamp were not discussed in the court of appeals, and the point already noticed seems to have been presented in this court for

the first time. No doubt is entertained by us that plaintiff's leasehold extended to the Mississippi river, and that he was the owner of all such rights as the law will imply from that fact. On this point, and so far, we are all agreed; but a majority of the members of this court regard the injuries which plaintiff suffered as consequential merely, and that, therefore, he cannot maintain his action. I concede that if the damage suffered by plaintiff, as the result of the acts of the city, were of that nature, that no recovery could be had by him, and such was our ruling in the last utterance of this court on that subject. (Broadwell *vs.* City of Kansas, 75 Mo., 213.) In that case a recovery was allowed by us on the ground that the injury declared on was not consequential, but a direct physical invasion of the property of the complainant. I think, considering the nature of the property, that the taking in this case is equally direct as in that, and as much forbidden by the constitution, and that the destruction of riparian rights is a taking. On this point I entirely concur with Judge Bakewell, of the court of appeals, where he says: "When it is settled that riparian rights are property, and of this there seems to be no doubt, the question as to the right to take them without compensation is at an end." (Myers *vs.* City of St. Louis, 8 Mo. App. 266).

The authorities cited by the respective parties to this controversy need not be discussed. It is sufficient to say that they have been examined by us, and differing conclusions have been reached, as already stated. Owing to the view taken by a majority of the members of this court that the damages complained of by plaintiff were not of such a nature as to be within the protection or prohibition of the constitution of this State, the judgment as well of the court of appeals as of the circuit court must therefore be reversed; in which reversal I do not concur.

T. A. SHERWOOD.

And on the same day the following separate opinion was delivered in said cause by Associate Justice John W. Henry, to wit:

MYER, Resp., *vs.* THE CITY OF ST. LOUIS, App.

In the opinion delivered in this case by Sherwood, J., for the court, the facts are not sufficiently stated to show the grounds upon which the judgment of the court of appeals was reversed. The construction of the dike in question was authorized by an act of the General Assembly of this state, and the injury sustained by plaintiff was not the immediate consequence of its construction, but was the result of deposits of sediment from time to time, not culminating in the injury complained of until months after the construction of the dike. The saw logs were not immediately submerged, nor was the riparian right claimed by plaintiff immediately affected by the construction of the dike. I may add, also, that the dike was constructed in 1874, before the new constitution went into effect, and there is no allegation that it was negligently or carelessly constructed, but only that it was an unlawful and unauthorized act.

JOHN W. HENRY.

And on the same day the following separate opinion was delivered in said cause by Associate Justice R. D. Ray, to wit:

167 I do not concur in the opinion of the majority of the court, nor indeed with some of the views expressed by Sherwood judge, in his opinion.

In order to the affirmance of this judgment it is not necessary, upon the facts of this record, to inquire or determine whether there has been a taking of private property for public use without just compensation, but it is sufficient if it appears, as it clearly does, that the act complained of is a wrongful act, and has been done without competent authority. The petition charges that "defendant unlawfully caused a certain dike, composed of limestone and other materials, to be built in said river, commencing at the foot of said Bryan street and extending thence eastwardly a distance of over 700 feet, into and across the said natural channel of said river, said dike being about 20 feet broad and extending from the bed to the surface of said river, which said dike was an obstruction to the navigation of said river, and was built against the protest of plaintiff and without warrant of law. If that be so, and it further appears, as the record abundantly shows, that the plaintiff in sequence thereof has sustained a special damage peculiar to himself, then he is intitled to recover. In such cases it is wholly immaterial whether the injury be to person or property, direct or consequental. (Wood on the Law of Nuisances, sec. 621.)

If the river in which the dike in question was built had been an inland stream, over which the State of Missouri had exclusive jurisdiction, then the positions contended for and the authorities cited might have been applicable to this case. (Wood on Law of Nuisances, sec. 302 and 596.)

In the case at bar, however, the Mississippi river being a public navigable river of the United States and a highway of commercial intercourse between the States, the general government has the ultimate and paramount jurisdiction; and the dike in question being an obstruction materially interfering with its navigability, and the defendant failing to show any such competent authority to construct the same, he is, therefore, liable to the plaintiff for such special damage peculiar to himself as he may have sustained by reason thereof, whether direct or consequential. If the dike in question had been shown by the evidence to have been but a slight obstruction to navigation, then, perhaps, under the limited and subordinate jurisdiction of the State, it would not be regarded as a nuisance if the public benefit therefrom is equal to the inconvenience created to navigation. But this qualification is subject to the restriction that the State may not authorize a material obstruction to navigation. When such an obstruction, materially interfers with the use of the stream for the purposes of public passage, is erected even under authority from the State, it is at least so far a nuisance that the party erecting it will be liable for all damages resulting therefrom to individuals; and the authority conferred by the State in such cases is no protection or defence to the action. (Wood on Law of Nuisances, secs. 596, 597, 621, and authorities there cited.)

I am therefore of the opinion that the judgment of the court of appeals should be affirmed.

R. D. RAY, *Judge.*

168 And afterwards, to wit, on the 1st day of January, A. D. 1884, the following further proceedings were had in said cause, to wit:

Appeal from St. Louis Court of Appeals.

JOHN Q. MEYERS, Respondent,
vs.
CITY OF ST. LOUIS, Appellant.

Now, at this day, comes the said respondent, by attorney, and files his motion for a hearing herein.

169 Which said motion is in words and figures as follows, to wit:

Motion for Rehearing.

In the Supreme Court of Missouri. October Term, 1883.

JOHN Q. MYERS, Respondent, *vs.* CITY OF ST. LOUIS, Appellant.

John Q. Myers, the respondent in the above cause, being so advised by counsel, respectfully prays the court to grant him a rehearing in said cause.

Your petitioner will show that a question decisive of the case, and duly submitted by his counsel, has been overlooked by the court, and that the decision of the court is in conflict with the Constitution and an express statute, and with controlling decisions, to which the attention of the court was not called through inadvertence of his counsel.

First.—What was the Case before the Court?

The plaintiff's amended petition averred as follows: (1.) That the plaintiff owned the Mississippi river front for a certain distance, and had a valuable mill on it. Valuable because of his riparian rights. (2.) That just below plaintiff's property the city constructed a dyke, commencing at the foot of Bryan street, and extending eastwardly out into and across the natural channel of the river; said dyke was 20 feet broad, and extended from the bed to the surface of the river. (3.) That said dyke was an obstruction to navigation, and was built without warrant of law. (4.) That this dyke diverted the natural flow of the water from plaintiff's shore front; the effect of this diversion being a large deposit of mud injurious to plaintiff's riparian rights, and destructive of his property.

The defendant's answer, so far as material, is to this effect: (1.) The defendant is a municipal corporation, its eastern boundary being the middle of the main channel of the Mississippi river. (2.) That at the time of building said dyke defendant was authorized to construct all needful improvements in the harbor, comprising the bed of said river, its channels, bayous, bars, and islands from the mouth of the Missouri river to the mouth of the Meramec river, and

to guide and deflect the currents of the river, and to erect, repair, and regulate public wharves and docks, etc. (3.) That long before the building of said dyke, the public wharf of the city of St. Louis was duly established and opened in front of plaintiff's premises, including the plaintiff's landing, and extended eastwardly as far as said dyke was built. (4.) That Bryan avenue is a public street, and said dyke was a continuation of said public street towards the eastern boundary of the city, and said dyke was wholly within the boundary of the city. (5.) That the defendant built the dyke to control the rapid and dangerous current of the river, and to complete Bryan street.

Second. With great deference we beg to say that the court has erred in assuming that the construction of the dyke in question was authorized by an act of the General Assembly of the State.

There was no act especially authorizing the construction of this dyke, nor could the court (see opinion of Henry, judge) have intended to be so understood. The court only intended to say that the city charter gave it power "to construct all needful improvements in the harbor" (and for that purpose); "to control, guide, or deflect the currents of the river; to erect, repair, and regulate public wharves and docks." It is hardly reasonable to suppose that the General Assembly intended to approve any and everything that might be done by the city after the passage of that act, as authorized by it. Had such been the legislative intention its language would have been something like this: The city should have absolute power over the river within its harbor. But had such been the grant would the statute be valid? Certainly not. The constitution of Missouri, R. S., 1865, p. 42, Art. XI, § 2, declares: "Said river Mississippi, and the navigable rivers and waters leading into the same, whether bordering on or within this State, shall be common highways, and forever free to the citizens of this State and the United States, without any tax, duty, import, or toll therefor imposed by the State." The act of Congress, March 6th, 1820, 1 R. S., 1825, p. 35, to authorize the people of Missouri to form a constitution and State government, and for the admission of such State into the Union, etc., required the above provision as a condition of its admission into the Union. The condition was accepted by the State, and it became a compact between the State of Missouri and the United States. When the Constitution of the United States provided, Art. 4, § 2, that "the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States," the free navigation of these rivers was fully secured by the Constitution. Assume, now, that this dyke was authorized by the city charter, merely because it is a dyke, and because it was constructed after the passage of the city charter, and the same assumption would authorize any dyke or structure whatever. A dyke 10 feet above highwater mark, destroying entirely the navigation of the river, would, by the same token, be authorized by an act of the General Assembly of the State. In a more careful examination of the city charter the court will see that it authorizes no kind of structure specifically, but defines a principle for the government of the city when interfering with the

currents of the river. The city may make "needful improvements" in the harbor, and to that end "control, guide, deflect the currents" of the river, etc. This is a limited power, not an absolute power. We believe it to be settled beyond question: (1.) That whoever places in the channel of a public river an obstruction, without warrant of law, is guilty of a public nuisance, and liable, in an action, to any one suffering special damage thereby. (2.) That whoever places in the channel of a river an obstruction, claiming to have legislative authority to do so, must show his authority, and by his pleading and proofs bring his actions strictly within the authority granted. That is to say, *prima facie*, all obstructions put in the channel of a public river are illegal, and the onus is on him who made them to justify the act. That a power cannot be exceeded, and that one acting under a power is limited by the extent of the power, is a universal principle. 3 Hill, 621, Runvick *vs.* Morris. An act of the Legislature gave an individual and his assigns the right to erect a dam on navigable waters. The dam was so constructed as to impede the navigation beyond the scope of the act, and was held a nuisance. Angel, Water Courses, 6th ed., sect. 556; 13 How., 519, Pennsylvania *vs.* Wheeling Bridge Company.

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The Ohio is a navigable stream, subject to the commercial power of Congress, which has been exercised over it; and if the act of Virginia authorized the structure of the bridge so as to obstruct navigation, the act would afford no justification to the bridge company. Angel on Water Courses, 6th ed., sect. 562, says the authors of all obstructions to the free navigation of public rivers, are, of course, liable at common law, as the authors of public nuisances, to indictment, and, if such obstructions are licensed by the legislature or permitted by statute, it is incumbent on the defendant to bring his case within the act of the Legislature as an exception. 1 Barr, Pa. R. R., p. 105, Comm. *v.* Church. "When a person sets up on a license to do the acts charged in the declaration, the license must be clearly established; and it must clearly appear that the injury complained of is fairly within the contemplation of the party giving the license. * * * The same is the case when a party claims under a legislative grant." Wood's Law of Nuisance, 1st ed., §840; 2nd ed., §850, 33 N. J. L. R. 524, Freeman *v.* Headley. This is the principle. These the controlling decisions, which, through inadvertence of counsel, the plaintiff failed to bring to the attention of the court. The same doctrine is clearly laid down in the case Mo. River Packet Co. *v.* H. & St. Jo. R. R. (see unanimous opinion of the court per Ray, judge). In the plaintiff's view of the case, the onus was on the defendant to show that the dyke it constructed was within the scope allowed by the constitutions and the charter, and unless that was shown by the defendant, the dyke was an illegal structure. The court has held erroneously; we submit (in the greatest deference) that the building of the dyke was *prima facie* authorized by the statute.

Assume now that every person who places an obstruction in a public river, *prima facie*, commits a public nuisance, and any one who suffers thereby a special injury has his action against the ob-

structor, and to resist such action the defendant, must show legislative authority, and must bring himself by his pleadings and proofs strictly within the authority granted. What, then, is the status of the defendant? A careful consideration of the defendant's answer, we think, will show that it sets forth no justification for the construction of the dyke. It does set forth the authority given by the charter "to construct all needful improvements in the harbor." But it does not aver that this dyke was a needful improvement either in itself, nor that it would contribute to a needful improvement.

The defendant knew well it was not an improvement, but a positive injury to the harbor; and, therefore, the defendant dared not call it an improvement; dared not even allege that in some way or other it produced a salutary effect on navigation.

172 The defendant knew perfectly well that there was no proof to support such an averment. Why was it that defendant failed to charge that after the construction of the dyke there was somewhere in the harbor a better state of things—more water, current, or safer commerce? Because such was not the fact. The defendant knew the dyke was never finished; and if it had any purpose, it failed of it utterly. Whatever the purpose of the construction was, it was abandoned *in medias res*. It was built just far enough out to destroy plaintiff's property, and suddenly abandoned as mysteriously as it was begun. The answer attempts to justify it by calling it a continuation of Bryan street. But defendant does not call it a street. Of course the city had power to construct streets. But defendant does not claim to have made this dyke under its power to construct streets. A street, for what purpose? A street in a public river, nearly level with the surface of ordinary water! A street dangerous to every one who would walk upon it, but on which no one ever walked!! A street across the middle of the main channel of the river, and ending in the river!!!

The answer sets forth that defendant had power by its charter to control, guide, deflect the currents of the river. The powers are all in aid of the power to improve the harbor. They can be used for nothing else. But concede that they stand alone, as independent grants of power; not one of the terms employed would justify damming up the main channel of the river. This is not guiding, deflecting or controlling the current. The powers granted to the city by the charter were intended to be those that are universally conceded to the States over public rivers, in the absence of Congressional legislation; powers to improve, preserve, and protect. They cannot mean more, for if they do, they are condemned by the Constitutions.

The answer sets forth that long before the building of said dyke the public wharf of the said city was duly established and opened in front of plaintiff's premises, including plaintiff's landing, and extended eastwardly to the end of said dyke. We are at a loss to see what this means—whatever it might mean it is not true. It is true that the city passed an ordinance to establish and open a wharf, but nothing to any effect was done under it, all the proceedings being void and excluded by the court. The city did not incorporate

these proceedings in the record. The charter expressly requires lands and rights of riparian proprietors to be condemned before the opening of the wharf. They were never condemned, and the wharf never opened. How could this justify the construction of the dyke?

Still seeking for a reason, the defendant says the dyke was built to control the rapid and dangerous current of the river. There is more in this than any other averment in the answer; it approaches the question of needful improvement. But it is not true. The testimony shows that the current was not dangerously rapid. It was a fine, navigable channel. All steamers ascending and descending the river took that current. It was the part of the river in which vessels were anchored for safety in winter. On the trial the defendant attempted to put in evidence that the purpose of building the dyke was to arrest the water flowing along the western
173 shore of the river above Bryan street, and hold it to the shore till the muddy water and sandy particles suspended in running water would settle and make land along said shore.

The court excluded it because there was nothing in the pleadings to allow it, and because the city had no power to obstruct the channel to make land on plaintiff's front.

Now, the court will see that the defendant has not brought itself in the matter of this dyke within the scope of any power granted to it, and that it stood in the circuit court wholly on its denials.

Third. The plaintiff respectfully prays the court to reconsider the following portions of its opinions in the cause, viz:

Per SHERWOOD, Judge: "A majority of the members of this court regard the injuries which plaintiff suffered as consequential merely, and that, therefore, he cannot maintain his action."

Per HENRY, Judge: "The construction of the dyke in question was authorized by an act of the General Assembly of the State; and the injury sustained by plaintiff was not the immediate consequence of its construction, but the result of deposits of sediment from time to time, not culminating in the injury complained of until months after the construction of the dyke. The saw logs were not immediately submerged, nor was the superior right claimed by plaintiff immediately affected by the construction of the dyke." "There is no allegation that it was negligently or carelessly constructed, but only that it was an unlawful act."

All these rulings are based upon the assumption that the dyke was expressly authorized by the statute. We admit that, if a constitutional act of the General Assembly directs, or permits a certain thing to be done, it is lawful to comply with such act. We admit that one who strictly executes a lawful power is not liable to an action for so executing it, yet, we agree, he is liable for any abuse of his power, or want of reasonable care and skill. But in great deference, all this is foreign to the case. If the dyke was an unlawful structure, having no lawful end in view, how is it possible to show that it was negligently or carelessly constructed?

If the legislature authorize a bridge of specified dimensions, height, pillars, spans, and materials, you can compare the work re-

quired to be done with the work done and point out negligence. But suppose you don't know what the structure was intended for, what comparison can you make? If, in fact, this dyke was constructed to obstruct the navigation, it was skillfully executed. If it was done to heap up on the western shore of the river a vast body of still water, to be and remain a receptacle of all the mud and sand brought into it by the moving current above, and make land to the eastward, and submerge the plaintiff's property, it was done with eminent skill and care. If it was done to obstruct navigation by a dam across the channel, the question is not one of skill or negligence, but of lawfulness. An unlawful act is not redeemed by the care with which it is performed—murder, ever so skillful, is murder.

However firmly impressed that the question of direct and consequential damage is not in the case, and that the dissenting opinion of Ray, judge, states the true issue, we shall endeavor to show that the damage suffered by plaintiff caused by the dyke, was not of the class called "consequential," but was direct in the sense of that
174 distinction. We have experienced an embarrassment in this case to which counsel ought never to be subjected, arising from the fact that the learned judges who decided the cause wrote no opinion. The opinion is written by a dissenting judge, and on its delivery one of the concurring judges announces his dissatisfaction with the opinion of the court as drawn up by the dissenting judge. We are at a loss to know in what precise sense the word "consequential" is used by the court. This is very important to the plaintiff now, and had the opinion of the court been drawn up by a concurring judge, could hardly have been left to surmise. Whatever doubt we have as to the meaning assigned by the court to the term "consequential," we can have no difficulty in perceiving the nature of that other damage variously defined as "direct," "immediate," "close," or "proximate." The unanimous opinion of this court in Broodwell *v.* Kansas City, 77 Mo., p. 13, is clear enough. In that case quantities of earth, set in motion by the act of the defendant's agents, rolled down the embankment it was constructing, in and upon the plaintiff's house, and injured it. This court was unanimous that plaintiff could recover. The court said this was a trespass upon and invasion of plaintiff's property. It will be observed that the defendant did not itself invade or trespass on plaintiff's property; it simply set in motion quantities of earth, which, obeying a law of motion, rolled down upon the plaintiff's house and injured it. The same is the principle here: The city did not go on the plaintiff's land in person and invade it with carts and teams, and dump upon it ten thousand loads of mud and sand and millions of gallons of water, but it set to work by its direct action and intentionally a more potent engine of destruction. It built a dyke across the natural channel of the river just below plaintiff's property. That dyke arrested the water accustomed to flow unceasingly by plaintiff's property; diverted its natural course; enveloped plaintiff's property in a vast pool of still water, from which no act of plaintiff could extricate it. This diversion of the flow of the water was the proximate, immediate, and close effect of the dyke on plaintiff's property.

It was an invasion of plaintiff's property as positive and direct as the rolling of the quantities of earth on the house of plaintiff in 75 Mo., p. 213, and there was no delay about it—*co instanti* that each barge load of stone was heaped upon the dyke, in that same moment another mass of still water was fixed upon the plaintiff's property.

This mass of eddy water, unable to pass away from plaintiff's
175 property, took possession of it and deprived plaintiff of his enjoyment of it the moment it was rolled back by the dyke.

From the moment this pool or eddy was created by the act of the defendant, the sand and mud it contained was certain to drop. More than this, the pool was to remain there as a receptacle for all mud and sand brought down the river, which it was to suck up as a sponge, and deposit to the destruction of plaintiff's property. This conduct of defendant was as direct an invasion of plaintiff's property as if it had been committed by ten thousand men with wagons and teams. That these deposits were not made for months (which cannot be true) is immaterial. The plaintiff's property was taken when the flow of the stream was arrested and diverted, and the water held on it by the act of defendant.

"The diversion of a stream from its natural channel into an artificial one, or changing the course by an embakment, is a taking of the private property of an individual, though such improvement is made with care or skill." Mill Em. Domain, § 81. "There is a growing inclination to hold, that any change in the banks of a stream which operates to throw water, earth, sand, or other material on real estate, or the erection of any structure which effectually impairs the usefulness of the land, within the meaning of the constitutional protection, though done in course of the improvement of a navigable river," is a taking of property.

"Certainly a new channel cannot be constructed so as to cut off a riparian owner access to the river, though done by establishing a new wharf line at a distance from the navigable part of the river." (Same book, § 80.)

13 Wall., 166, Pumpilly *v.* Green Bay Co.; 1 Abbot, U. S., 266, Avery *v.* Fox; 10 Wall., 497, Yates *v.* Milwaukee; Cooley Con. Lim., 5th Ed., p. 671, title, "What Constitutes a Taking of Property;" Angell Water C., § 465 a; 30 Mich., 308, Grand Rapids, etc., *v.* Jarvis; 2 Sedgwick Dam., 7th, pp. 565–568; Cooley on Torts, p. 583, says, the proprietors above have no right to divert or unreasonably retard the natural flow of the waters to the proprietors below, and the proprietors below have no right to retard the flow, or turn back the water upon the proprietors above, to their prejudice.

The main channel of the river lay immediately alongside of plaintiff's bluff bank by nature, and that main channel was, by the building of the dyke, thrown several hundred yards to the east. If, as a riparian owner, it was his right to have the river flow by his land as it flowed by nature, and if that right was property (as all cases hold), then that property was taken from him by the building of the dike, and it was that which worked his great loss.

Now, if the property of the plaintiff was taken by interruption and diversion of the water flow as soon and as fast as the dyke was

constructed, the diversion was the immediate proximate cause of the injury and not a more consequential effect. A man's finger may be pierced by a needle to-day and lock-jaw not appear for a
176 month. Nevertheless the needle puncture was the direct cause of the injury, and the lock-jaw was direct, and not consequential, in the meaning of the rule, because it appeared later. If a city, in the exercise of its power to open and improve streets, builds an embankment high enough to overshadow the house of A, but in manner interferes with A's possession by touch or contact, and A's house is ruined, the damage in that case is consequential, and A has no remedy. But suppose the city had caused a pool of water to envelop A's house by damming up a stream on June 1, 1882, and no visible deposit of mud is discovered on A's house before June 1, 1883; or suppose A's house falls down from the effect of the pool, but not until June 1, 1883, still the whole damage in these cases is direct and not consequential. The whole damage, whenever developed, is referred to the first wrongful act, and is part of it. This point, that the diversion of the flow of the water caused by the dyke was a taking of plaintiff's property, was distinctly made by the plaintiff and overlooked by the court.

Practice.

FOURTH. The plaintiff ventures to complain of the judgment of the court in refusing to remand the cause as harsh. The plaintiff tried the cause on the theory that the *onus* was on the defendant to show that the dyke was a lawful structure; that is to say, that it was authorized by statute, and constructed within the limits of the statutory power.

The plaintiff proceeded upon the idea that any obstruction placed in a public river was *prima facie* a nuisance until explained, and that the *onus* of explanation was on the defendant. The court decided that *prima facie* the obstruction in this case was lawful and a needful improvement, and the *onus* on the plaintiff to prove that it was negligently or carelessly constructed, and immediately entered final judgment against plaintiff.

This, we think, was unjust.

The case was not one for final judgment.

The full case of the plaintiff was not presented by the record.

The court should never proceed to final judgment unless requested by the parties, or unless it is clear that the case of each party is fully disclosed by the record.

Had the plaintiff's counsel understood that the dyke *per se* would be considered a needful improvement, and the *onus* on the plaintiff to show that it was not skillfully constructed for an improvement, he would have assumed the *onus*. He would have averred and proved that the dyke was not an improvement, but a great injury to the harbor; that it was built across the middle of the main channel of the river and into the State of Illinois; that it turned the channel, across which it was built, out of the State of Missouri; that the top of said dyke was, in some places, under the surface of the

water; that after it was built the channel east of Arsenal Island, in the State of Illinois, the only one left, was not safe for navigation; that the Government of the United States interfered and stopped the construction of the dyke, and it was not finished; that the United States officers set danger lights on the dyke; and that the United States dredge-boats removed 400 to 500 feet of the said dyke from the channel, restoring, to a certain extent, the free navigation.

We say that it is hard practice thus to cut off a party by final judgment from an amendment showing a meritorious cause of action, especially in a case where everything he possesses is at stake, simply because his counsel blundered on a point of practice. The plaintiff is ready to verify the facts by affidavit, according to statute.

GLOVER & SHEPLEY,
With whom are MYERS & ARNSTEIN,
For Plaintiff.

177 And afterwards, to wit, on the 26th day of February, A. D. 1884, the following further proceedings were had in said cause, to wit:

Appeal from St. Louis Court of Appeals.

JOHN Q. MEYERS, Respondent, *vs.* CITY OF ST. LOUIS, Appellant.

Now, at this day, the court having fully considered and understood the motion heretofore filed for a rehearing herein, doth order that said motion be, and the same is hereby, sustained, and this cause set for a rehearing on April 16th, 1884.

And afterwards, to wit, on the 17th day of April, A. D. 1884, the following further proceedings were had in said cause, to wit:

Appeal from St. Louis Court of Appeals.

JOHN Q. MEYERS, Respondent, *vs.* CITY OF ST LOUIS, Appellant.

Come now the parties in the above causes, by attorneys, and, after argument therein, submit the same to the court on briefs.

178 And afterwards, to wit, on the 16th day of June, A. D. 1884, the following further proceedings were had in the said cause, to wit:

Appeal from St. Louis Court of Appeals.

JOHN Q. MEYERS, Respondent, *vs.* CITY OF ST. LOUIS, Appellant.

Now, at this day, come again the parties aforesaid, by their respective attorneys, and the court here being now sufficiently advised of and concerning the premises, do consider and adjudge that the judgment aforesaid, in form aforesaid, by the said St. Louis court of appeals rendered, be in all things affirmed, and stand in full force and effect. And it is further considered and adjudged by the court that the said respondent recover against the said appellant his costs and charges herein expended, and have therefor execution.

(Opinion filed.)

Which said opinion is in the words and figures following, to wit:

179 JOHN Q. MYERS, Resp., } On rehearing.
vs.
CITY OF ST. LOUIS, App. }

The cause has been reargued. From that reargument I have been more than ever convinced that the judgment recovered by the plaintiff in the circuit court and afterwards affirmed in the court of appeals is based on the most solid foundations of reason and authority. In the opinion of the court of appeals the subject of the destruction of riparian rights and the reciprocal right of compensation for such destruction has been fully discussed, and reference made to numerous authorities, which abundantly sustain the position of the plaintiff here, and I simply refer to them and to other authorities cited for plaintiff in this court as fully applicable to the facts of this case, and as sustaining in a very satisfactory way the opinion of the court of appeals. The whole subject may be summarized thus:

The plaintiff was the possessor of certain riparian rights. These rights were property. Of that property he could not be deprived without just compensation, nor could the State itself either exercise such a power of deprivation or confer it upon some subordinate municipality dissevered from the constitutional condition of compensation for the property taken. And the destruction of the property right in question was a taking within the meaning of the constitution of 1865, and of the authorities cited on behalf of plaintiff.

On the original argument the point was made for defendant that a recovery was had for damages done after suit brought. This is not true in point of fact. The injury was done prior to suit brought, but the full consequences thereof did not appear until resort was had to the courts for redress.

The case in this respect is not unlike the case of injury to a person where a blow is received before suit brought, but where the full extent of the injury done does not make itself manifest until long after action begun.

But for all that, the injury is none the less direct, none the less concurrent and contemporaneous with the blow, though the damage done is not at once fully apparent.

For these reasons the judgment of the court of appeals affirming that of the circuit court should be affirmed. Norton and Ray, JJ., concur; Hough, chief-justice, and Henry, J., dissent.

T. A. SHERWOOD.

And afterwards, to wit, on the 23d day of June, A. D. 1884, there was filed in said cause a bond, which is in the words and figures as follows, to wit:

180 Know all men by these presents, that we, the city of St. Louis and Samuel Cupples and Jacob S. Merrell, are held and firmly bound unto John Q. Myers in the full and just sum of seventy thousand dollars, to be paid to the said John Q. Myers, his heirs, executors, administrators, or assigns, to which payment, well and

truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 17th day of June, in the year of our Lord one thousand eight hundred and eighty-four.

Whereas, lately at the April term, 1884, of the supreme court of Missouri, in a suit depending in said court between John Q. Myers, plaintiff, and the City of St. Louis, defendant, judgment was rendered against the said defendant, and the said defendant having obtained a writ of error from the Supreme Court of the United States to the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said John Q. Myers, citing and admonishing him to be and appear at a Supreme Court of the United States to be holden at Washington, the second Monday of October next:

Now the condition of the above obligation is such, that if the said City of St. Louis shall prosecute said writ of error to effect, and answer all damages and costs if it fail to make good its plea, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered in presence of—

THE CITY OF ST. LOUIS,
By WM. L. EWING, *Mayor.* [SEAL.]
SAM. CUPPLES. [SEAL.]
JACOB S. MERRELL. [SEAL.]

Attest:
[SEAL.] NICHOLAS BERG, *Register.*

Approved by—
WARWICK HOUGH,
Chief Justice of the Supreme Court of Missouri.

181 STATE OF MISSOURI, *ss:*

I, Henry W. Ewing, clerk of the supreme court of Missouri, do hereby certify that the above and foregoing is a full, true, and complete transcript of the record and proceedings in the above-entitled cause, as fully as the same remain of record and on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at office in the city of Jefferson, this 9th day of September, A. D. 1884.

[SEAL.] HENRY W. EWING, *Clerk.*

Endorsed on cover: Missouri supreme court. No. 958. The City of St. Louis, plaintiff in error, *vs.* John Q. Myers. Filed 26th September, 1884.

113-56

SUPREME COURT

OF THE UNITED STATES.

OCTOBER TERM, 1884.

THE CITY OF ST. LOUIS,
Plaintiff in Error,

vs.

JOHN Q. MYERS,
Defendant in Error.

No. 958.

ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

PETITION FOR A RE-HEARING ON BEHALF OF THE PLAINTIFF IN ERROR.

Times Printing House, 5th & Chestnut Streets, St. Louis.

SUPREME COURT

OF THE UNITED STATES.

OCTOBER TERM, 1884.

THE CITY OF ST. LOUIS,
Plaintiff in Error,
vs.
JOHN Q. MYERS,
Defendant in Error.
No. 958.

PETITION FOR A RE-HEARING.

The city of St. Louis, the plaintiff in error in the above cause, being so advised by counsel, respectfully prays the court to grant it a rehearing in said cause.

The petitioner will endeavor to show that the decision of the court dismissing the writ of error for want of jurisdiction, is in conflict with a prior and controlling decision of this court, to which the attention of the court was not called through the inadvertence of the counsel for the plaintiff in error.

The present action was commenced in the state circuit court at St. Louis, Missouri, on September 19, 1874. It is an action for damages to defendant in error as the alleged owner of certain riparian rights, by the construction of a stone dike by the plaintiff in error, eastwardly into the Mississippi river, from the foot of Bryan street, in the city of St. Louis. The answer denied that the defendant in error was the owner of the riparian rights spoken of. The effect of the dike was to shoal the water of the river in front of the premises occupied by the defendant in error, which premises were north of and adjacent to Bryan street. The defendant in error recovered a judgment of $35,000 in the trial court. The judgment was affirmed by the supreme court of Missouri, the state court having final jurisdiction thereof, on June 16, 1884. The plaintiff in error thereupon sued out a writ of error, under which the record has been brought here.

At the trial of the case in the state circuit court the following instruction was given to the jury, on motion of the defendant in error and against the objection and exception of the plaintiff in error:

The court instructs the jury that a person owning a lot of ground bordering on the Mississippi or any other navigable river, and bounded thereby, or having a leasehold estate in such lot, has not only the right lawfully to use and navigate such river for purposes of business in common with and as one of the general public, but in addition thereto he has also a right known as a riparian right, growing out of and founded upon his title or ownership of the bank of the stream. The riparian right exists, notwithstanding the title to the soil in the bed of the stream belongs to the general public, and included in this right is the privilege of exclusive access to and from the navigable part of the river at that particular point, and any other special facilities for gain or

pleasure which the location of his land so situated affords. This riparian right is in itself property, and can not be destroyed or materially impaired without compensation to the owner of the same.

The plaintiff in error moved the court to give the following instruction, which was refused and an exception saved:

The court instructs the jury that under the pleadings and evidence the plaintiff is not entitled to recover.

The action of the trial court on the above instructions was affirmed by the supreme court of Missouri.

The pleadings in the cause and the above instructions given and refused, raised two questions, namely: Is the defendant in error a riparian proprietor on the Mississippi river? If the defendant in error is held to be a riparian proprietor, what is the measure and extent of the liability of the plaintiff in error by reason of the matters complained of in the petition?

The state supreme court decided both of the above questions, and held, first, that the defendant in error was a riparian proprietor on the Mississippi river; and, secondly, that he was entitled to be made good in damages for any disturbance of his right of exclusive access between his premises and the navigable part of the river.

Both of the above questions, are Federal questions. In Railway Company vs. Renwick, 102 U. S. 180, a motion was made to dismiss a writ of error sued out from this court to the supreme court of Iowa, on the ground that the case was not within section 709 of the revised statutes of the United States. The defendart in error, a riparian proprietor, recovered in the state court of Iowa against the railroad, a judgment in damages for the appropriation by the railroad

company of a strip of ground in the city of Davenport, Iowa, between high and low water mark, on the Mississippi river. The company claimed that the title to the soil between high and low water mark being vested in the state, a riparian owner was not entitled to damages by reason of the company's obstructing his access to the Mississippi river by their railroad in front of his premises. The motion to dismiss the writ of error was overruled, and it was held that the question was a Federal question, conferring on the supreme court of the United States jurisdiction to review the action of the state court; accordingly, the court proceeded to examine the cause, and on the merits of the controversy affirmed the judgment of the state court.

It is respectfully submitted, that under authority of the case cited, the jurisdiction of the court in the case at bar is complete, and that the action of the court in dismissing the writ of error, for want of jurisdiction, should be reconsidered.

LEVERETT BELL,
for Plaintiff in Error.

I hereby certify that, in my opinion, the foregoing petition for a rehearing is well founded in point of law.

Leverett Bell
of counsel
for pltff in error

113-566

SUPREME COURT

OF THE UNITED STATES.

OCTOBER TERM, 1884. No 958.

THE CITY OF ST. LOUIS,
Plaintiff in Error,
vs.
JOHN Q. MYERS,
Defendant in Error.

ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

ARGUMENT OF LEVERETT BELL, ON BEHALF OF THE PLAINTIFF IN ERROR, IN SUPPORT OF THE JURISDICTION OF THIS COURT, AND AGAINST THE MOTION TO DISMISS THE WRIT OF ERROR.

Times Printing House, Fifth and Chestnut Streets, St. Louis.

SUPREME COURT

OF THE UNITED STATES.

OCTOBER TERM, 1884.

THE CITY OF ST. LOUIS,
Plaintiff in Error,
vs.
JOHN Q. MYERS,
Defendant in Error.

ARGUMENT IN SUPPORT OF THE WRIT OF ERROR AND AGAINST THE MOTION TO DISMISS THE SAME.

This action was commenced in the state circuit court at St. Louis, Missouri, on September 19, 1874. It is an action for damages to defendant in error as the alleged owner of certain riparian rights, by the construction of a stone dike by the plaintiff in error, eastwardly into the Mississippi river, from the foot of Bryan street, in the city of

St. Louis. The effect of the dike was to shoal the water of the river in front of the premises occupied by the defendant in error, which premises were north of and adjacent to Bryan street. The defendant in error recovered a judgment of $35,000 in the trial court. The judgment was affirmed by the supreme court of Missouri, the state court having final jurisdiction thereof, on June 16, 1884. The plaintiff in error thereupon sued out a writ of error, under which the record has been brought here.

The jurisdiction of this court is maintained on four distinct and independent grounds, as follows:

1. At the trial of the case in the state circuit court the following instruction was given to the jury, on motion of the defendant in error and against the objection and exception of the plaintiff in error:

> The court instructs the jury that a person owning a lot of ground bordering on the Mississippi or any other navigable river and bounded thereby, or having a leasehold estate in such lot, has not only the right lawfully to use and navigate such river for purposes of business in common with and as one of the general public, but in addition thereto he has also a right known as a riparian right, growing out of and founded upon his title or ownership of the bank of the stream. The riparian right exists, notwithstanding the title to the soil in the bed of the stream belongs to the general public, and included in this right is the privilege of exclusive access to and from the navigable part of the river at that particular point, and any other special facilities for gain or pleasure which the location of his land so situated affords. This riparian right is in itself property, and can not be destroyed or materially impaired without compensation to the owner of the same.

The plaintiff in error moved the court to give the following instruction, which was refused and an exception saved:

The court instructs the jury that under the pleadings and evidence the plaintiff is not entitled to recover.

The action of the trial court on the above instructions was affirmed by the supreme court of Missouri.

The act of congress of March 6, 1820, 3 U. S. Stat. at Large, § 45, under which Missouri was admitted into the Union, established the eastern boundary of the state of Missouri in the middle of the main channel of the Mississippi river, and enacted that the state should have concurrent jurisdiction on said river so far as it formed a common boundary, with any other state bounded by the same, and that the river should be common to the states so bounded by it, and *a common highway, and forever free.* It is repugnant to the nature and character of this grant, to uphold as private property, the right of any one person to navigate the river. A claim of this character can have no legal existence. The right of the defendant in error to navigate the river up to his premises and make a landing thereat was a right he enjoyed with all mankind. There was nothing exclusive in its character; it was not *property* within the meaning of that term as employed in the above instruction. If it were the fact (which I deny) that the estate of the defendant in error was bounded on the east by the Mississippi river, his property rights terminated at the water's edge. The proprietor of land on the Mississippi river owns only to this point. Benson vs. Morrow, 61 Mo., 345.

In Yates vs. Milwaukee, 77 U. S., 497, it was held that a riparian proprietor on a navigable stream has the right of access to the navigable part of the river from the front of

his lot; not the *exclusive* right, as the state court instructed the jury in the above instruction.

The instruction given at the instance of defendant in error, draws in question the validity of the statute of the United States by which the waters of the Mississippi river are declared to be a common highway, and forever free, by asserting rights in the defendant in error inconsistent with and contrary to said statute. The decision of the state supreme court impairs the statute, and in effect denies its validity. The case, therefore, is within the jurisdiction of this court, as defined in section 709 of the revised statutes of the United States.

2. The act of congress of March 6, 1820, above referred to, gave to the state of Missouri concurrent jurisdiction with Illinois over the Mississippi river; and the eastern boundary of the state of Missouri was fixed at the middle of the river. The bed of the river to the center of the channel was vested in and belonged to the state. The title of the riparian owner extended only to the water's edge. Benson vs. Morrow, 61 Mo., 345.

The legislature of Missouri by act of March 3, 1851 (Laws of Mo., 1851, p. 573), granted all lands owned by the state not reserved for public purposes, within the quarantine limits of the city of St. Louis, to the said city absolutely.

The act is entitled "An act about swamp lands in St. Louis county," approved March 3, 1851, and is as follows:

Be it enacted by the General Assembly of the State of Missouri, as follows:

SECTION 1. That all the right, title, interest and claim of the state of Missouri, acquired by virtue of an act of congress, entitled "an act to enable the state of Arkansas and other states to reclaim the swamp

lands within their limits," approved September 28, 1850, or otherwise, in and to those two certain islands in the Mississippi river, in the county of St. Louis, the one called and known as Duncan's Island, situate, lying and being opposite to the lower part of the city of St. Louis; the other called and known as Quarantine Island, lying below said city, and being the same now occupied and used by said city authorities for quarantine purposes, is hereby transferred, and set over, to said city of St. Louis.

SEC. 2. All lands owned by this state, not reserved for public purposes, within the limits within which the city of St. Louis is empowered by its charter to enforce quarantine laws, are hereby granted to said city, with power to receive and hold the same, and with all powers in reference thereto as said city now has over other property held by said city. This act to be in force from its passage. Approved, March 3, 1851.

Congress, by act of June 12, 1866 (U. S. Stat. at Large, vol. 14, p. 63, section 9), conveyed all of the right, title and interest of the United States in and to all of the wharves, streets, lanes, avenues, alleys, and all other public thoroughfares within the city of St. Louis in fee simple to the city of St. Louis.

The city charter of St. Louis, granted by the state of Missouri, in force from 1870 to 1876, covering all the time embraced in this controversy, established the eastern boundary of the city of St. Louis opposite the premises in question, at the middle of the main channel of the Mississippi river; and authorized the city to construct all needful improvements in the harbor, comprising the bed of the Mississippi river, its channel, shores, bayous, bars and islands, and to control, guide and deflect the currents of the river, and to erect, repair and regulate public wharves and docks, etc.

The charter is printed in the Laws of Missouri of 1870,

at page 458 and following, and section 1 of article 3 thereof, at page 463, is as follows:

SECTION 1. The mayor and city council shall have power within the city by ordinance, not inconsistent with any law of the state, * * * * * * to construct all needful improvements in the harbor, which shall comprise the bed of the Mississippi river, its channel, shores, bayous, bars and islands, from the mouth of the Missouri river to the mouth of the Meramec river, to control, guide or deflect the currents of the river, to erect, repair and regulate public wharves and docks. * * *

The dike in question was erected pursuant to the following ordinance of the city of St. Louis:

An ordinance to improve the harbor opposite Bryan street.

Be it ordained by the city council of the city of St. Louis:

SECTION 1. The city engineer is hereby authorized and directed to construct a stone spur dike eight feet above low water, to connect to present high bank of the Mississippi river east of the Iron Mountain railroad with the east line of the wharf as established by ordinance number fifty-four hundred and three, at the foot of Bryan street, in a linear continuation with the south side of said street.

SEC. 2. The sum of twenty-five hundred dollars is hereby set apart out of the harbor fund for the construction of said dike.

Approved July 11, 1873.

The dike was built on territory within the limits of St. Louis. The eastern boundary of the corporation of St. Louis extends to the middle of the main channel of the Mississippi river. Jones vs. Soulard, 65 U. S., 41; Schools vs. Risley, 77 U. S., 91.

The eastern boundary of the city of St. Louis was established in the middle of the main channel of the Mississippi river in the first charter granted to the city on December 9,

1822, and power to improve and preserve the navigation of the river within the city was contained in the same instrument.

There is no allegation in the petition on which the case was tried, and no evidence in the record that the plaintiff in error was guilty of any negligence, unskillfulness or want of care in the construction of the Bryan street dike. It is not pretended that by any foresight or caution on the part of the city of St. Louis in planning or executing the work, the injury in question could have been averted. It is moreover conceded that there was no invasion of the property of defendant in error, and no physical injury committed on the premises. The claim of the defendant in error is, that he possessed a riparian right, growing out of and founded on his occupation of the premises to the bank of the river, and included in the right was the privilege of exclusive access to and from the navigable part of the river, and this right was property which could not be destroyed or materially impaired without compensation to the owner.

The petition on which the case was tried in the state circuit court, avers that the

> Defendant unlawfully caused a certain dike, composed of limestone and other materials, to be built in said (Mississippi) river, commencing at the foot of Bryan street and extending thence eastwardly a distance of over seven hundred feet into and across the said natural channel of the said river; said dike being about twenty feet broad, and extending from the bed to the surface of said river; which said dike was an obstruction to the navigation of said river, and was built against the protest of the plaintiff, and without warrant of law.

There is no allegation of negligence or want of care on the part of the defendant (plaintiff in error here) in locating or

constructing the dike in question. The averment is that the city of St. Louis committed an *unlawful*, not a *negligent*, act, and hence it must respond in damages.

It may be proper to remark at this point that the evidence did not sustain the allegations that the dike extended across the natural channel of the river and obstructed the navigation thereof. The Mississippi river at the foot of Bryan street has a width of about one mile. The eastern boundary of the state of Missouri is in the middle of the main channel of the river. It is a fluctuating boundary, and follows the movement of the channel. It is idle to assert that a dike projecting eastwardly seven hundred feet from the Missouri shore at Bryan street extended into the state of Illinois, or across the main channel of the river, or that it turned the channel out of the state of Missouri, or that it interfered with or impaired navigation.

The work involved no physical invasion of the premises held by defendant in error, and no physical injury to said premises. The injurious effects produced on the property by the dike, were all embraced in the fact that after the dike was built, it was less convenient to haul saw logs from the river to the mill. The defendant in error admitted at the trial that there was no injury to the mill building or machinery, that no material was deposited on his lot, and no damage done except the loss of saw logs and the destruction of his rights by the accumulation of mud and the diversion of the river. The mud spoken of was not deposited on the premises occupied by the defendant in error, but in the bed of the river in front of said premises, and it was caused by the action of the current of the river.

The authority exercised by the city of St. Louis in building the dike in question was derived from the United States under the grant made to the state of Missouri by the act of congress of March 6, 1820, conferring on the state jurisdiction over the territory on which the dike was located. This authority for the purpose of building a dike, was transferred by the state to the city of St. Louis, in the city charter of March 4, 1870, above referred to; and congress by the act of June 12, 1866, conveyed in fee simple to the city of St. Louis the title of the United States in and to the wharves and streets of the city. The dike was an extension and formed a part of Bryan street. It was a lawful structure, built under a grant of power made by congress to the state of Missouri and by the state legislature to the city of St. Louis, and in pursuance of an ordinance duly adopted, and a contract let in conformity with the law governing public work, and the dike was located on territory over which the jurisdiction of the state and the city was complete for the purposes aforesaid. The state authorized the city to construct all needful improvements in the harbor of St. Louis, comprising the bed of the Mississippi river, and to control, guide and deflect the currents of the river. The dike in question was built pursuant to this authority. The plaintiff in error offered testimony to show the purpose of the dike, and it was excluded by the trial court on the objection of the defendant in error. In the absence of any legislation by congress on the subject, the right of the state to authorize a structure of the character in question, is established by the following authorities:

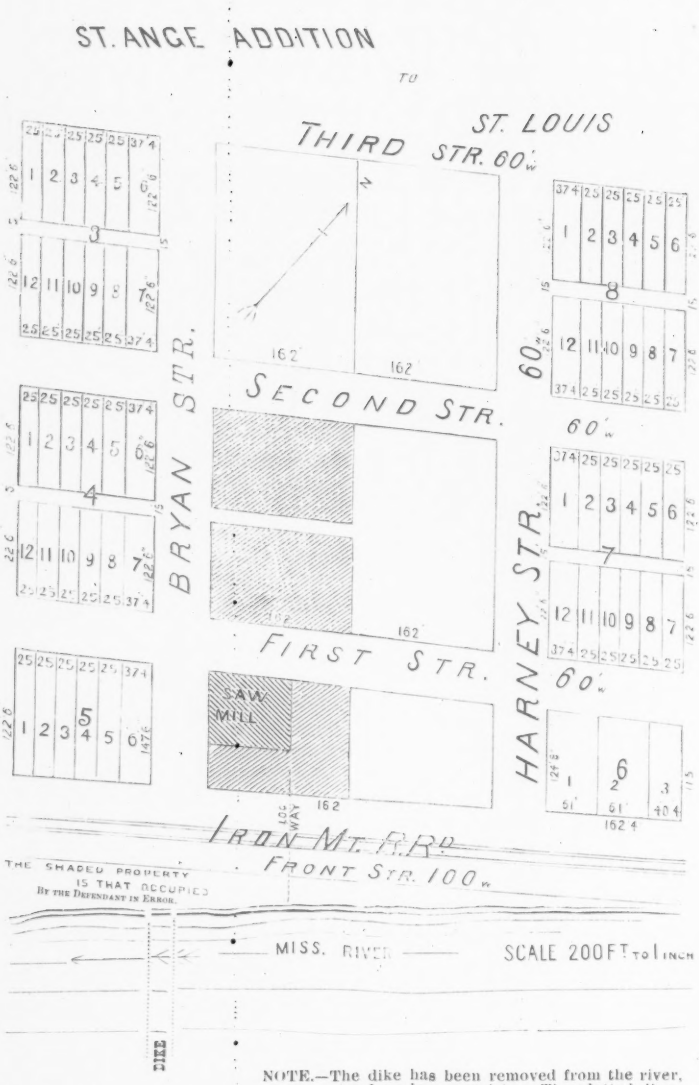
Willson vs. Black Bird Co., 27 U. S., 245;
Gilman vs. Phila., 70 U. S., 713;
Atlee vs. Packet Co., 88 U. S., 389, 395;
Barney vs. Keokuk, 94 U. S., 324;
Pound vs. Turck, 95 U. S., 459;
Escanaba Co. vs. Chicago, 107 U. S., 678.

The judgment of the state court awarding damages against the city of St. Louis for the construction of the dike, on the ground that it was an unlawful structure, was a decision against the right and privilege set up and claimed by the plaintiff in error under the statutes of the United States aforesaid, to build the dike in question, and the authority of this court to review said decision by writ of error can not be denied.

3. The state court held and decided against the objection and exception of the plaintiff in error, that the defendant in error was a riparian proprietor and the possessor of the riparian right claimed by him. The question of riparian ownership on the Mississippi river is a federal question depending for its solution on the federal constitution and statutes, and the decision of the federal courts thereunder. The decision of the state court thereon was a decision against an immunity and exemption from said riparian ownership, claimed by the city of St. Louis under the constitution, statutes and authority of the United States. It is therefore within the jurisdiction of this court.

The defendant in error in 1874 and 1875 was in possession of the premises in question under a lease which by its terms was to expire on January 1, 1880. The property

granted by this lease was described as having a front of 162 feet on Front street as laid out on the plat of St. Ange addition to the city of St. Louis, and being in said addition, and extending westwardly to Second street. Subsequently mention is made in the lease that the property is bounded on the east by the Mississippi river. It is aparent from the description contained in the lease that Front street intervened between the lot in question and the river. There is no difficulty in locating the lot on the map of St. Ange addition. There is no confusion or uncertainty or ambiguity as to its boundaries. Not only does Front street exist between the lot and the river, but the street is traversed lengthwise by two railway tracks owned and operated by the Iron Mountain Railway company. The following plat shows the premises and their location with reference to the river bank :



NOTE.—The dike has been removed from the river, and no longer exists. The dotted lines show its location in 1874.

It is settled law that if the granted premises are bounded in terms by a public road, which separates them from the water, they extend only to the center of the road, and the grantee is not a riparian proprietor.

Gould on Waters, 276, 288;
Banks vs. Ogden, 69 U. S., 57;
Saulet vs. Shepherd, 71 U. S., 502;
People vs. Colgate, 67 N. Y., 512;
Allegheny City vs. Morehead, 80 Penn. St., 118;
Allen vs. Munn, 55 Ill., 486.

The question of the true location of plaintiff's (defendant in error here) eastern boundary, as it presents itself in this case, is one between him and the public. It is not an issue between the landlord and the lessee. The plaintiff, to make himself a riparian proprietor, must show title and possession to the river bank, not only as against his grantor, but also as against the public. In this case it is clear that the plaintiff's grantor, had no title east of Front street to convey; and by this I mean that the evidence does not disclose any ownership in said grantor in the territory east of said street. It is equally clear that said grantor did not intend, by the lease under which plaintiff claims, to convey any right in territory east of said street. Furthermore, the evidence shows that the only connection existing between plaintiff's premises and the Mississippi river was a log-way, on which logs were transported from the river to the mill, underneath the railway tracks, and the use of the log-way was necessarily subservient to the use of the ground by the railway company. I submit, with confidence, that the plaintiff was not possessed of any riparian right.

4. The decision of the state supreme court herein, changed a rule of property that was established and existed in Missouri from 1849 to 1884, by and under the former decisions of said supreme court. It, in this respect, violated section 10 of article 2 of the constitution of the United States, which forbids a state from impairing the obligation of a contract.

In Gelpcke vs. Dubuque, 68 U.S.,175,it is held that where a state supreme court has in a series of decisions established a given construction to a state statute, the validity and obligation of a contract existing under said statute can not be impaired by a subsequent decision of the court altering the construction of the law. This doctrine is followed in Missouri. State vs. Miller, 50 Mo., 129.

The first constitution of Missouri was adopted in 1820, and it contained in section 7 of article 13, the following provision: "That no private property ought to be taken or applied to public use without just compensation." In 1865 the second constitution of the state was adopted and it contained the same provision in the same language in section 16 of article 1. The third constitution of Missouri, being the one now in force, went into effect on November 30, 1875, and it contains in section 21 of article 2, the provision: "That private property shall not be taken *or damaged* for public use without just compensation."

At the time this action was commenced in 1874, and at the time of the happening of the alleged injuries in the months of July and August, 1874, and down to and until November 30, 1875, when the state constitution of 1875 went into effect, there was no constitutional provision in

force in Missouri under which the act of inflicting *damage* on private property for public use, without compensation, was prohibited. The testimony in this case in the state circuit court embraced matters happening as late as July, 15, 1875. The action was commenced on September 19, 1874. During all the period prior to November 30, 1875, no constitutional provision in force in Missouri prohibited private property from being *damaged* for public use without compensation; and no principle of law expressed in the statutes of the state or declared by the courts of the state authorized the maintenance of an action to recover such damages. In other words, from the adoption of the first state constitution in Missouri on July 19, 1820, to November 30, 1875, when the state constitution of 1875 went into effect, private property was forbidden by constitutional enactment to be *taken* or *applied* to public use without just compensation: but it was not forbidden to be *damaged* for public use without just compensation; and, as the law existed and was administered, no remedy was given by the state legislature or the state courts for the recovery of such damages.

By a series of decisions, the supreme court of Missouri established the rule that a municipal corporation, in the absence of negligence, is not answerable in a civil action for consequential damages arising from the execution of a public work which it is authorized by the state to engage in, and that such damages do not constitute a taking of private property for public use. The cases referred to cover the period from 1849 to 1883, and are the following:

St. Louis vs. Gurno, 12 Mo., 414;
Taylor vs. St. Louis, 14 Mo., 20;

Hoffman vs. St. Louis, 15 Mo., 65;
Schattner vs. Kansas City, 53 Mo., 162;
Imler vs. Springfield, 55 Mo., 125;
Wegman vs. Jefferson City, 61 Mo., 55;
Foster vs. St. Louis, 71 Mo., 157;
Swineford vs. Franklin Co., 73 Mo., 279;
Broadwell vs. Kansas City, 75 Mo., 213;
Werth vs. Springfield, 78 Mo., 107, 109.

These decisions established the construction to be placed on the constitutional provision, forbidding private property to be taken for public use without compensation. And they decided the law in conformity with the views of this court as expressed in Transportation Company vs. Chicago, 99 U. S., 635, where it was held that a riparian owner on a navigable stream, or an adjoiner on a public highway can not maintain a suit at common law against public agents to recover consequential damages resulting from obstructing a stream or highway in pursuance of legislative authority, unless that authority has been transcended, or unless there was a wanton injury inflicted, or carelessness, negligence, or want of skill in causing the obstruction. See also to the same effect:

Radcliff vs. Mayor, 4 Comst. (N. Y.), 195;
Mayor vs. Willison, 50 Md., 138;
Gould vs. Railroad, 6 N. Y. (2 Seld.), 522;
Tomlin vs. Railroad, 32 Iowa, 106;
Barney vs. Keokuk, 94 U. S., 324.

And see also Pumpelly vs. Green Bay Company, 80 U.S., 166, where at p. 180 it is said: "We are not unaware of

the numerous cases in the state courts in which the doctrine has been successfully invoked that for a consequential injury to the property of the individual arising from the prosecution of improvements of roads, streets, rivers, and other highways, for the public good, there is no redress; *and we do not deny that the principle is a sound one, in its proper application, to many injuries to property so originating.* And when in the exercise of our duties here, we shall be called upon to construe other state constitutions, we shall not be unmindful of the weight due to the decisions of the courts of those states. But we are of opinion that the decisions referred to have gone to the uttermost limit of sound judicial construction in favor of this principle, and in some cases beyond it, and that it remains true that where real estate is *actually invaded* by superinduced additions of water, earth, sand or other material, or by having any artificial structure placed on it, so as to effectually destroy or impair its usefulness, it is a taking, within the meaning of the constitution, and that the proposition is not in conflict with the weight of judicial authority in this country, and certainly not with sound principle. *Beyond this we do not go*, and this case calls us to go no further."

The plaintiff in error built the dike complained of, in the year 1874, relying on the above rule for its protection. On the other hand, the defendant in error acquired and held the saw mill and property possessed by him subject to said rule. The court below in the case at bar overturned the existing rule, and established a different one, and gave a new meaning and construction to the provision of the state constitution, which says: "That no private property ought

to be taken or applied to public use without just compensation." In adopting this action the state court impaired the obligation of the contract existing between the municipal government of St. Louis, and the defendant in error, as the owner and occupant of property in said city. It created a new right and a new remedy between said parties, where none had existed before, and contrary to the continuous ruling of said court on the same subject matter, for a period exceeding one third of a century. The case is therefore one in which a writ of error lies from this court to the state court, pursuant to section 709 of the general statutes of the United States.

I desire to make one further remark. The damages complained of in this case are alleged to have been suffered in the year 1874. The state constitution of Missouri of 1865 was in force at the time, and it provided: "That no private property ought to be taken or applied to public use without just compensation."

On November 30, 1875, subsequent to the alleged commission of said injuries and subsequent to the ~~the~~ institution of this action, the present state constitution of Missouri took effect, and it provides: "That private property shall not be taken *or damaged* for public use without just compensation."

By the constitution of 1865, property *taken* for public use was protected. By the constitution of 1875, property *taken* or *damaged* for public use was protected. The constitution of 1875 extends to the property owner in Missouri

a right and a remedy not possessed by him prior to November 30, 1875, when said constitution went into effect.

In Transportation Co. vs. Chicago, 99 U. S., 635, at p. 642, it is said:

"The present constitution of Illinois took effect on the 8th of August, 1870, after the work of constructing the tunnel had been substantially completed. It ordains that private property shall not be 'taken or *damaged*' for public use without just compensation. *This is an extension of the common provision for the protection of private property.* But it has no application to this case, as was decided by the supreme court of the state in the case of Chicago vs. Rumsey, recently decided and reported in vol. 10, Chicago Legal News, page 333."

And to the same effect, are

Atlanta vs. Green, 67 Ga., 386;
Elgin vs. Eaton, 83 Ill., at p. 536;
Chicago vs. Rumsey, 87 Ill., 348;
Reading vs. Althouse, 93 Penn. St., 400;
Pusey vs. Allegheny, 98 Penn. St., 523;
Lycoming Co. vs. Moyer, 99 Penn. St., 615;
Werth vs. Springfield, 78 Mo., 107, 109.

The constitution of 1875 is not retro-active in its operation. It has no application to the present case. It has changed the law of Missouri, and under its operation the question at issue here is an obsolete one as to matters happening subsequent to the day when said constitution went into effect.

Under the constitution of 1865, as construed by the state supreme court from 1849 to 1883, and covering the

time of the happening of the alleged injuries in this case, no right of action existed upon the facts here, because the case is not one of the *taking* of private property for public use. Where property was only *damaged* for public use, no ground of recovery existed under the constitution of 1865.

The motion to dismiss the writ of error should, it is respectfully submitted, be denied.

LEVERETT BELL,
for Plaintiff in Error.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1884.—No. 958.

JOHN Q. MYERS,

Deft. in Error.

against

THE CITY OF ST. LOUIS,

Plff. in Error.

Motion on behalf of Deft. in Error to Dismiss Writ of Error, &c., and Brief in support of same.

NATH'L. MYERS,

Counsel for Deft. in Error.

Supreme Court of the United States,

OCTOBER TERM, 1884.

JOHN Q. MYERS,
Defendant in Error,

AGAINST

THE CITY OF ST. LOUIS,
Plaintiff in Error.

No. 958.

And, now comes the said defendant in error, and moves the Court to dismiss the writ of error herein, for the reason that no Federal question is involved in the case.

NATH'L MYERS,
Counsel for Defendant in Error.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1884.

JOHN Q. MYERS,
Defendant in Error,

AGAINST

THE CITY OF ST. LOUIS,
Plaintiff in Error.

No. 958.

And, now comes the said defendant in error, and moves the Court to affirm the judgment herein (should the mo-

tion to dismiss the writ of error herein be denied), on the ground that it is manifest that the writ of error herein was taken for delay only, and that the question upon which the jurisdiction of this Court depends is so frivolous as not to need further argument.

NATH'L MYERS,
Counsel for Defendant in Error.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1884.

JOHN Q. MYERS,
Defendant in Error,

AGAINST

THE CITY OF ST. LOUIS,
Plaintiff in Error.

No. 958.

Statement and Points for Defendant in Error on Motion to dismiss Writ, and on Motion to affirm.

This is a motion to dismiss a writ of error, on the ground that no Federal question is involved.

Coupled with this is a motion to affirm, on the ground that the question of law involved has already been decided by this Court, &c.

The action was an ordinary one, brought over ten years ago, against the City of St. Louis, for damages sustained by the plaintiff, through the diversion of the channel of the Mississippi river from plaintiff's water front (see amended petition, Record, p. 2).

Plaintiff owned a saw mill on the Mississippi river at St. Louis, and enjoyed very valuable riparian privileges,

which he claimed were property, and which privileges were wholly destroyed by defendant's act.

The diversion of the river, and destruction of plaintiff's riparian privileges, were accomplished by the city by the building of a dike at a point immediately adjacent to plaintiff's property, and extending from the water's edge at the foot of a street called Bryan street, 700 feet eastward, and immediately across the main channel of the river, and extending from the bed to above the surface of the water (Rec., p. 2).

Prior to the building of the dyke, the main channel of the river lay immediately in front of plaintiff's lot, which terminated in a bluff, perpendicular bank, about 25 feet high, and washed by the main channel of the river. The dyke, being built up to near the top surface of this bluff bank, threw the river over towards the Illinois shore, as was intended, and created an impassable triangular deposit of soft sediment about 25 feet deep, extending from the shore line out to the outer point of the dyke. The situation is shown by Pitzman's testimony (p. 48) and Pitzman's plat (p. 52.)

Whether, or not, defendant had the right to destroy these water privileges at all, the plaintiff claimed that in any event they could not be taken from him either by the municipality or by the State itself, without due compensasation made to him therefor.

All the Courts of the State held the plaintiff's riparian privileges were "property" within the meaning of the State constitution, and that he could not be lawfully deprived of them, except only for public use, and then only upon due compensation made (see Instruction, p. 110, and opinions of Court of Appeals and Supreme Court, pp. 115 and 136).

The case was tried and determined upon the general principles of jurisprudence. The following was the only instruction given to the jury (Rec., p. 110):

"The Court instructs the jury, that a person owing a lot of ground bordering on the Mississippi, or other navigable river, and bounded thereby, or having a leasehold estate in such lot, has not only the right lawfully to use and navigate such river for purposes of business, in common with

and as one of the general public, but, in addition thereto, he has also a right known as a riparian right, growing out of and founded upon his title to or ownership of the bank of the stream. The riparian right exists, notwithstanding the title to the soil in the bed of the stream belongs to the general public; and included in this right is the privilege of exclusive access to and from the navigable part of the river at that particular point, and any other special facilities for gain or pleasure which the location of his land so situated affords. This riparian right is in itself property, and cannot be destroyed or materially impaired, without compensation to the owner of the same.

Therefore, if the jury find from the evidence that the plaintiff, at the time stated in his amended petition, was the owner of the leasehold term therein described in the lot fronting on the said river; that there was a saw mill and appurtenances for running a steam sawmill upon said lot; and that the nature of the bank, and bed, and current of the river, and the location of the channel at that point, afforded plaintiff valuable facilities of access to the river at that point for conducting the said sawmill business; and, if the jury further find, that the defendant caused to be built the dyke in controversy in this cause, prior to the bringing of this suit; and that by the building of said dyke, the said natural channel of said river, and the original waterline at said point, were thrown some hundreds of feet east of their natural location, as they were located before the building of said dyke; and that by the building of said dyke a deposit of mud and sediment was left between the bluff bank at that point and the water's edge, thereby materially impairing the facility of access to the navigable water of said river at that point which plaintiff had theretofore enjoyed, then the jury should find a verdict for the plaintiff, and assess his damages at such sum, not exceeding the amount claimed, as under the evidence the jury find will compensate him for the injury sustained to his property or estate.

In case the jury find for the plaintiff, then (inasmuch as the riparian right above spoken of is a right appurtenant to the leasehold estate), the jury may take into consideration how much, if any, the value of plaintiff's leasehold

estate was lessened by the act of defendant in building the dyke; and the amount it was so lessened in value, and the value of any logs that were lost directly in consequence of the same act of the defendant, will be the measure of plaintiff's damage.

The burden of showing the amount of his damage rests upon the plaintiff, and the jury should only allow such direct damage, of the kind above indicated, as the plaintiff has proved to their satisfaction during the progress of this trial."

The jury found for the plaintiff, and the judgment was affirmed by the various Appellate Courts. Besides a general denial, the only matters set up as defenses by the city were (see City's Answer Rec. p. 5):

1st. That the Eastern boundary of the city was "the middle of the main channel of the Mississippi River;" that Bryan street was a public street, and that the dyke was a mere extension of Bryan street.

2d. That by an act of the Missouri Legislature of March 3, 1857, the State had granted to the city such of the lands owned by the city within the city limits as the State had not reserved for public purposes.

3d. That by an act of Congress of June 12, 1866, the United States had quit claimed to the city all the right, title and interest which the United States may have had (if any), in and to all the wharves, streets, lanes, alleys, &c., within the city limits.

4th. That by an act of the Missouri Legislature of March 4, 1870, the city was authorized to construct all needful improvements in the harbor, and for that purpose to control the currents of the river and to erect public wharves. It was not pleaded, however, nor attempted to be proven, that the dyke was a needful improvement in point of fact. Indeed the city did not call it a needful improvement, not even in the preamble to its ordinance. It was nowhere termed such, except impliedly in the answer; and there-

after it disappeared from the case; no evidence being offered on the subject by the city.

5th. That the public wharf of the city was duly established in front of plaintiff's premises and included the landing in front thereof. (Defendant offered in evidence certain formal condemnation proceedings instituted by the city; but, as plaintiff's land in controversy here was not described nor involved therein, the record was excluded [Rec., page 98], and this defense thereby disappeared).

As to the general denial the plaintiff made out his case to the complete satisfaction of the Court and jury; and as to the affirmative defenses, they were all disposed of by the State Courts, on the ground that whether the title to the bed of the river was in the city or not, and no matter whether it derived that title from the State or Federal Government, and whether plaintiff's title extended to the edge or to the centre of the stream, nevertheless, if the plaintiff owned to the water's edge (as the jury found he did), his riparian ownership gave him certain privileges which were defined in the instructions of the Court; that these privileges were "property" within the meaning of the State constitution; and that this "property" could not be taken except only for public use and then only on due compensation made, no matter upon what pretext it was taken, and no matter whether the scheme of the city actually improved the harbor or not. (See Instruction to the Jury, p. 110; opinion of Court of Appeals, p. 115, and of Supreme Court, p. 136).

Beyond this there was absolutely nothing involved in the case.

POINTS.

I.

The case involved no Federal question. It was determined wholly upon the general principles of jurisprudence.

The case did not involve the validity of any treaty, the validity of any statute, nor the validity of any authority exercised under the United States; and of course there was no decision either for or against their validity. And there was not drawn in question the validity of any statute of any State, nor the validity of any authority exercised under the State, on the ground of their repugnancy to the paramount Federal law, or on any ground; and, of course, there was no decision in favor of their validity nor against it.

Nor was any right, title, privilege or immunity claimed under the Constitution, &c., of the United States. And, of course, there was no decision against the title, right, &c., thus *not* set up, nor any decision either way. In short, nothing in any the remotest way emanating from a Federal source any where appeared in the case, except only the mere simple fact that the city offered to prove by an Act of Congress, that if the United States had ever had any title or interest in any wharves, streets, lanes, avenues, alleys, or public thoroughfares, anywhere within the limits of the City of St. Louis, it had, in 1866, quit-claimed such interest to the city.

The irrelevancy of that fact is too patent to justify any serious discussion. The validity of that statute was, of course, undisputed. No one can doubt the right of the United States to convey or quit-claim to any one any lands it may own anywhere. Whether or not it ever owned any land in the neighborhood of this trespass did not appear, and indeed it was unimportant. If it did own any such, prior to 1866, it quit-claimed its title to the city.

It is not pretended that the United States ever owned plaintiff's land, nor the land that was in this case damaged by the building of the dyke.

The plaintiff's title was found in his favor by the jury; and in fact was not seriously disputed, except that it was pretended that it did not extend to the water's edge; but the Court and jury found that it did. Surely, however, *that* was not a Federal question. His title being conceded or proven, it was quite immaterial who owned the land in the neighborhood, or whether the Federal Government had ever owned any such land. The only question was whether

under the principles of jurisprudence, that obtained in the State of Missouri, the plaintiff's riparian rights were property of which he could be deprived, even for public use, without compensation. It was upon this question that the case turned; as conclusively appears from the Court's instructions to the jury (Rec. p. 110).

So, too, this was the only question presented to or considered by the Appellate Courts. Thus, says the Court of Appeals (p. 118): "The right to have the river flow by his land as it flowed by nature, and the right of access to the river at this point, were rights of plaintiff, as riparian owner, additional to his right as one of the general public, to use the river as a highway. His rights to access were exclusive, subject to the general easement in the public to use the river for purposes of navigation, and to make a temporary landing there when the exigencies of the case might require it. And this right was the property of plaintiff. * * * That the destruction of the riparian right of plaintiff was such a taking of private property as to come within the limitation on the exercise of the right of eminent domain, contained in the State Constitution, is clear, we think, both on reason and authority. * * * When it is settled that riparian rights are property, and of this there seems to be no doubt, the question as to the right to take them without compensation is at an end. * * The right of a riparian proprietor to the flow of the water in front of his lot is as much property as the lot itself, and it is immaterial that he does not own to the middle of the stream. There is nothing in the defense that the river was diverted to make a new wharf line. The Charter of the city in force at the time (Art. 8, Sec. 1) provides that 'whenever the city shall provide by ordinance for establishing * * * or altering any * * wharf * * and it becomes necessary for that purpose to take private property, just compensation shall be paid to the owner.'"

The whole matter was summed up by the Supreme Court of the State as follows (p. 136):

"The plaintiff was the possessor of certain riparian rights. These rights were property. Of that property he

could not be deprived without just compensation. Nor could the State itself either exercise such a power of deprivation or confer it upon some subordinate municipality dissevered from the constitutional condition of compensation for the property taken. And the destruction of the property right in question was a taking within the meaning of the Constitution of 1865."

II.

Even if the validity of an act of Congress relied on by the city had been involved, that claim alone would not confer jurisdiction upon this Court. It would have to appear affirmatively that the decision of the State Court was *against* the validity of the act, and that the case necessarily involved the question.

On the other hand, if some provision of the State Constitution, or an act of the State Legislature, relied on by the city, had been claimed to be in conflict with the Federal Constitution, that claim alone would not confer jurisdiction on this Court. It would have to appear affirmatively that the decision of the State Court had *recognized* the validity of the State statute, and had not recognized the superior authority of the Federal Constitution, or act of Congress, and that the case necessarily involved the question. In other words the appellate jurisdiction of this Court to review judgments of the State Court exists only for the purpose of Federal self-preservation.

Thus in Commercial Bank *vs.* Buckingham's Ex'rs, 5 How., 341, the Court says:

"It is not enough that the record shows that 'the plaintiff in error contended and claimed, that the judgment of the Court impaired the obligation of a contract and violated the provisions of the Constitution of the United States, and that this claim was overruled by the Court;' but it must appear by clear and necessary intendment, that the question must have been raised, and must have been decided

in order to induce the judgment. * * * Did the decision of this point draw in question the *validity* of either of these statutes on the ground of repugnancy to the Constitution of the United States? Or was the Court merely called upon to decide on their *construction?* * * * It is the peculiar province and privilege of the State Courts to construe their own statutes: and it is no part of the functions of this Court to review their decisions, or assume jurisdiction over them on the *pretence* that their judgments have impaired the obligation of contracts. The power delegated to us is for the restraint of unconstitutional legislation by the States, and not for the correction of alleged errors committed by their judiciary."

Where the construction of the Constitution or Statutes of the United States is involved, there is no appeal from the State Courts unless the decision is *against* the title or right set up by the party.

And, it must also appear that the title *depended* upon the statute.

Williams *vs.* Norris, 12 Wheat, 117.
Montgomery *vs.* Hernandez, 12 Wheat, 129.
Ryan *vs.* Thomas, 4 Wall., 603.

The statute must be specially set up by the party, and the decision be *against the claim;* and the point must be raised and decided against the party applying for the writ to the State Court.

Farney *vs.* Towle, 1 Black, 350.

In this case the Court, by Taney, *Ch. J.*, said:

"It must appear that the point was raised and decided in the State Court; that the attention of the Court was called to the particular clause of the Constitution of the United States upon which the party relied, and to the right he claimed under it; and that, with the question thus distinctly presented, the decision was against him."

Where the decision of the State Court is made on settled pre-existing rules of general jurisprudence the case cannot be brought to this Court for review.

Bank of West Tennessee *vs.* Citizens' B'k, 14 Wall., 9.

Palmer *vs.* Marston, 14 Wall., 10.
Sevier *vs.* Haskell, 14 Wall., 12.

Nor, where the case has been decided exclusively upon the principles of the jurisprudence of the State.

Marqueze *vs.* Bloom, 16 Wall., 351.

If the State Court has rested its judgment on some point in the case, not within the purview of § 709, of the Revised Statutes, and that point is broad enough to sustain the judgment, then, although the ruling of the State Court might be reversed on the point of Federal cognizance, this Court will not entertain jurisdiction of the case.

Rector *vs.* Ashley, 6 Wall., 142.
Crossley *vs.* City of New Orleans, 108 U. S., 105.

In New York Life Ins. Co. *vs.* Hendren, 92 U. S., p. 286, this Court said :

"Our jurisdiction over the decisions of the State Courts is limited. It is not derived from the citizenship of the parties, but from the questions involved and decided. It must appear in the record, or we cannot proceed. We act upon questions actually presented to the Court below, not upon such as might have been presented or brought into the case, but were not."

See also Dugger *vs.* Bocock, 104 U. S., 596.
Allen *vs.* McVeigh 107 U. S., 433.

III.

The underlying principle involved in the present case has been so long established, and is so universally recognized, and has been so emphatically approved by this Court, that there is really no longer room for debate upon it ; and, therefore, even if the motion to dismiss was not well founded, the motion to affirm ought to be sustained,

as was done in the case of Swope *vs.* Leffingwell, 15 Otto, 3.

Whether the riparian owner owns to the middle of the main channel or only to the water's edge is a question which this Court has said each State can settle for itself.

Barney *vs.* Keokuk, 4 Otto, 324.

And this Court has also said that—

"Whether the title of the owner of such a lot extends beyond the dry land or not, he is certainly entitled to the rights of a riparian proprietor whose land is bounded by a navigable stream."

Yates *vs.* Milwaukee, 10 Wall, 504.

What this riparian right is is a matter to be determined by each State; but, as this Court, speaking through Justice Miller said, in Yates *vs.* Milwaukee, *supra*—

"It is a right, of which, when once vested, the owner can only be deprived in accordance with established law, and, if necessary that it be taken for the public good, upon just compensation."

Indeed, as was said by McLean, *J.*, in Bowman *vs.* Wathen, 2 McLean, 376:

"Such riparian rights frequently constitute the chief value of river property, and, to deprive an owner of them without compensation, is to despoil him of a most valuable property."

Cooley, in his Constitutional Limitations, at p. 557, treats the doctrine as elementary.

See also Avery *vs.* Fox, 1 Abb., U. S., 246.

In *Yates* vs. *Milwaukee*, *supra*, it appeared that the City of Milwaukee undertook by ordinance to deprive plaintiff of one of his riparian rights, declaring in the ordinance that its destruction was necessary to the improvement of the navigability of the river.

But, there was no *evidence* that this was true; and this Court reversed the decree below, "with instructions to enter a decree enjoining the defendants below from inter-

fering with plaintiff's wharf, reserving, however, the right of the city to remove or change it, so far as may be necessary in the *actual* improvement of the navigability of the river, *and upon due compensation being made.*"

The declaration of the city that the destruction of plaintiff's wharf was desirable amounted to nothing. That was a question to be determined by the Court upon the evidence, and could not be determined by the city on its mere *ipse dixit.*

IV.

The case has been in Court over ten years, and has been through all the Courts of the State, and I respectfully request as early a determination of the motion, as the engagements of the Court will conveniently permit.

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